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Supreme Court, U.S.
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No. ____

IN THE

Supreme Court of the United States

RONNIE B. GREER,

Petitioner,

v.

DEBRA H. AMESQUA, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Petitioner Ronnie B. Greer was a firefighter employed by respondent City of Madison [Wisconsin] Fire Department. Greer was terminated by respondent commissioners of the Madison Police and Fire Commission for "whistle blowing" to local media that the Department chief, respondent Debra Amesqua, had illegally discriminated in favor of a training chief accused of abusing a Department recruit. During petitioner's discharge hearing, the commissioners refused to admit or consider Greer's offers of proof that Amesqua had, in fact, committed illegal discrimination. In Greer's subsequent action under 42 U.S.C. § 1983, respondents based their summary judgment motion on evidence neither presented to nor considered by the commissioners during the discharge hearing.

(1) Whether balancing competing interests for and against First Amendment protection of employee speech under *Pickering v. Board of Educ. of Township High Sch. Dist. 205, Will Cty. Ill.*, 391 U.S. 570 (1968) requires a government employer to consider the truth or basis in fact of an employee's allegations of official misconduct by the employee's superior?

(2) Whether a "reasonable" investigation under *Waters v. Churchill*, 511 U.S. 661 (1994) requires a government employer to consider evidence presented by a "whistle blower" employee that his allegations of official misconduct by his superior are true or have a reasonable basis in fact?

(3) Whether in a government employee's action under 42 U.S.C. § 1983 for discharge in retaliation for protected speech, an employer may rely on new evidence to support its disciplinary decision which was neither presented to nor considered by the employer during its administrative investigation and decision discharging the employee?

PARTIES

Petitioner. This Petition for a Writ of Certiorari is filed on behalf of Petitioner Ronnie B. Greer, who was plaintiff in the District Court, Western District of Wisconsin, and Appellant in the United States Court of Appeals for the Seventh Circuit.

Respondents. Respondents to this Petition for a Writ of Certiorari are Debra H. Amesqua, Alan Seeger, Margaret MacMurray, Byron Bishop, Lynn Hobbie, Mario Mendoza, the City of Madison Fire Department, the City of Madison, the City of Madison Police & Fire Commission, and Wisconsin Municipal Mutual Insurance Company, who were defendants in the District Court, Western District of Wisconsin, and Appellees in the United States Court of Appeals for the Seventh Circuit.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Ronnie B. Greer respectfully requests that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered May 9, 2000.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is reported at *Greer v. Amesqua*, 212 F.3d 358 (7th Cir. 2000). (Pet.-Ap. 1a.) The court of appeals' denial of Petitioner's petition for rehearing *en banc* was not separately

reported. (Pet.-Ap. 92a.) The decision of the United States District Court for the Western District of Wisconsin denying petitioner's motion for preliminary injunction is reported at *Greer v. Amesqua*, 22 F.Supp.2d 916 (E.D. Wis. 1998), *aff'd* 212 F.3d 358 (7th Cir. 2000). (Pet.-Ap. 60a.) The district court's decision granting respondents' motion for summary judgment was not reported. (Pet.-Ap. 27a.) The decision of the Madison Fire and Police Commission terminating petitioner was not reported. (Pet.-Ap. 94a.)

JURISDICTION

The judgment of the United States Court of Appeals for the Seventh Circuit was entered on May 9, 2000. Petitioner filed a Petition for Panel Rehearing and Rehearing en Banc which was denied by Order dated June 21, 2000. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment of the United States Constitution provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Section 1 of the Fourteenth Amendment of the United States Constitution provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any State deprive any person of life,

liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Wisconsin Statutes §§ 62.13(1) - (5m) (1997 - 98) are reproduced in the Appendix. (Pet.-Ap. 122a.)

STATEMENT OF THE CASE

This case arises from petitioner's discharge from his government employment as a firefighter. Petitioner alleged that he was terminated in retaliation for legitimate whistle blowing to local media regarding his chief's illegal favoritism based on gender and sexual orientation.[1] In his discharge proceedings before the police and fire commission, he argued that in balancing the competing interests for and against First Amendment protection of his statements (*see Pickering v. Board of Educ. of Township High Sch. Dist. 205, Will Cty. Ill.*, 391 U.S. 570, 571-73 (1968)), the interests favoring protection were substantially greater if his statements were true or had a reasonable basis in fact than if the statements were reckless or false. Although the discharge proceedings constituted the commission's investigation under *Waters v. Churchill*, 511 U.S. 661 (1994), the commission refused to investigate whether the chief had, in fact, illegally discriminated, and further refused to admit or consider petitioner's extensive offers of proof (including expert testimony) of such illegal activity.

In petitioner's subsequent action against respondents under 42 U.S.C. § 1983, respondents based their motion for summary judgment on evidence neither presented to nor considered by the commission during the discharge hearing. Over petitioner's objection, the district court allowed respondents' evidence,

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[1] Discrimination based on gender or sexual orientation is prohibited under the Wisconsin Fair Employment Law, Wis. Stat. ch. 111, subch. II (§§ 111.31 - .395) (1997-98).

granted their motion for summary judgment, and was affirmed by the court of appeals. Consequently, petitioner's statement of the case recites facts in the light most favorable to petitioner, resolving all inferences in his favor. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). As the Ninth Circuit stated in *Johnson v. Multnomah County*, 48 F.3d 420 (9th Cir. 1995), it must be presumed that petitioner's statements and offers of proof regarding his chief's illegal conduct "were true and made in good faith." *Id.*, 48 F.3d at 427.

A. Relationship of Parties.

Petitioner Ron Greer was a firefighter employed by respondent City of Madison Fire Department from 1981 until July 31, 1998, when he was terminated by respondent City of Madison Police and Fire Commission ("PFC"). The Department and PFC are municipal entities created under Wis. Stat. § 62.13 (Pet.-Ap. 122a), which invests the PFC with certain governance functions including hiring and discipline of personnel. Respondent Debra Amesqua is Department chief. Respondents Alan Seeger, Margaret MacMurray, Byron Bishop, Lynn Hobbie, and Mario Mendoza were PFC "commissioners" who terminated Greer.

B. The Holtz-Cato Incident and Greer's News Release.

Amesqua was appointed chief in January, 1996, and shortly thereafter promoted Lt. Marcia Holtz to training chief. On October 3, 1996, Holtz (a white female) hit, shoved, and screamed at recruit Ron Cato (a black male) during a training exercise. (Greer Offer of Proof, ¶ 2, Pet.-Ap. 130a.) Although Holtz told Amesqua about the incident the same day (Internal Department Memorandum, Pet.-Ap. 153a), Amesqua did nothing. On November 5, 1996, a local television station which had covered the training exercise broadcast a videotape of the incident. (Copies of the tape are included in the record below.) On November 12, 1996, the president of Firefighters Local 311, Lt. Joseph Conway, informed Amesqua that Holtz had also

physically and verbally abused other firefighters. He demanded that Amesqua order an independent investigation and suspend Holtz pending its outcome. (Conway letter to Amesqua, 11/12/96, Pet.-Ap. 154a.)

On November 14, 1996, over one month after being informed of the incident, Amesqua finally agreed to an internal investigation. (Amesqua letter to Conway, 11/14/96, Pet.-Ap. 156a.) However, she refused to suspend or discipline Holtz and refused to investigate Conway's reports of Holtz's abuses of other personnel. (Conway Offer of Proof, ¶ 3, Pet.-Ap. 157a.) Amesqua assigned the investigation to Division Chief William Spohn, her direct subordinate whose professional advancement depended solely on Amesqua's discretion. (Greer Offer of Proof, ¶ 3, Pet.-Ap. 139a - 42a). Spohn gave her the investigation materials on December 17, 1996. (Spohn Investigation Memorandum, Pet.-Ap. 163a.) However, Amesqua took no action. One month later on January 15, 1997, Conway asked for a copy of the Spohn materials. (Conway letter to Amesqua, 1/15/97, Pet.-Ap. 165a.) By letter dated January 28, 1997, Amesqua refused Conway's request, stating that the matter was "still under investigation." (Amesqua letter to Conway, 1/28/97, Pet.-Ap. 166a.)

On April 9, 1997, Amesqua finally issued a two page decision, over four months after receiving Spohn's report and over six months after the incident itself. Even though Amesqua characterized Holtz's actions as "questionable" and "extraordinary," she concluded that they were "not unreasonable" and were, instead, "professional in content and germane." (Amesqua Decision Re Holtz-Cato Incident, Pet.-Ap. 168a.) Although Amesqua imposed a six month extension of Holtz's probation and directed her to take a "leadership training" seminar, the probation was suggested by Holtz herself (*id.*, Greer Offer of Proof, ¶ 5, Pet.-Ap. 133a) and the "leadership training" was actually a "perk" -- an exclusive program for promising, upwardly mobile officers at the

National Fire Academy in Emmitsburg, Maryland, with admission only by special recommendation from Amesqua. (Williams Offer of Proof, ¶ 5, Pet.-Ap. 170a.) On April 10, 1997, Amesqua delivered her decision to Local 311 which distributed copies to its members. (Amesqua letter to Conway, 4/10/97, Pet.-Ap. 178a.) On April 28, 1997, when it became clear that Amesqua would take no meaningful action against Holtz, Greer (who is a black male) issued a statement to local media titled, "News Release: Homosexual Chief rewards Homosexual Chief for Assault?" (News Release, 4/10/97, Pet.-Ap. 179a.)

In the News Release, Greer stated that Holtz had "shoved and screamed" at Cato, and that Amesqua had found her actions "not unreasonable." Greer stated that the leadership class was "coveted by other chief officers" to the extent that there was a "waiting list" to get in and that Holtz herself had suggested the six month probation extension. Greer said that Amesqua's decision would be "laughable [if] it were not such a serious matter." He stated that in over seventeen years of firefighting, he had never seen a situation where it was necessary to physically "assault" another firefighter. He said that Amesqua had "down played" and "swept over" the incident, and questioned the possibility that Spohn was unduly influenced or that Amesqua had simply disregarded Spohn's conclusions. Greer questioned whether Amesqua had engaged in illegal favoritism towards Holtz because of friendship or because they were fellow members of an organization called Women in the Fire Service ("WFS"). Greer said that most firefighters saw WFS as a predominately homosexual organization, and that both Amesqua and Holtz were homosexual women who had "clear agendas" regarding "women in the fire service." He questioned whether their "radical agendas" had "come [into] play" so that even "violence" could be "excused," "glossed over" or "rewarded." He also stated that Amesqua's decision appeared to be "the

much assailed 'good-ol-boy' system revived, repainted and given another name." *Id.*

At the time Greer issued the New Release, he was already under investigation for distributing an anti-homosexual pamphlet in his fire station. (PFC Decision and Order Terminating Petitioner, Pet.-Ap. 102a.) In the News Release, he questioned why the Department would spend thousands of dollars to investigate his peaceful communication, but would "wink[ ] at and reward[ ] physical assault." Greer also made similar comparisons to ongoing disciplinary actions against several other firefighters and noted, "Oh, by the way, that male trainee who was the victim, he was mysteriously 'let-go' literally days before graduating from the fire academy. Makes you go, 'Hmm.' /s/ Just sharing my thoughts with you all." (News Release, 4/10/97, Pet.-Ap. 181a.)

C. Investigation, Hearing and Termination.

When a local paper subsequently published an article about the News Release, Amesqua ordered an investigation by Personnel Chief Carl Saxe who recommended dismissal. (Saxe Investigation Memorandum, 6/5/97, Pet.-Ap. 183a.) Amesqua then brought charges against Greer before the PFC under § 62.13 (5) (Pet.-Ap. 123a-126a) which provides for a quasi-trial discipline process including service of formal charges, responsive pleadings, representation by counsel, a formal hearing, the right to compel witnesses, and specific statutory criteria to which the PFC's decision must conform. *Id.*

Amesqua alleged that the News Release violated various Department work rules including prohibitions against disrespect towards superior officers, bringing the Department into disrepute, and harassment based on sexual orientation. *Greer*, 212 F.3d at 366 n. 1. (Pet.-Ap. 10a.).

At the PFC hearing, Greer denied that the News Release violated work rules and claimed First Amendment protection for his statements regarding illegal favoritism. *Id.*, 212 F.3d at

370 - 73. (Pet.-Ap. 20a - 26a.) Greer's defense raised two questions under the "*Pickering*" test: (1) whether the News Release addressed a matter of public concern and (2) whether the Department's interests in suppressing his speech outweighed the interests of Greer, the public, the Department and other firefighters in protecting it. *See generally, Pickering*, 391 U.S. at 571 - 73, *Connick v. Myers*, 461 U.S. 137, 150 - 51 (1983) and *Rankin v. McPherson*, 483 U.S. 378, 386 - 388 (1987).

Greer argued that because exposing official corruption is a paramount governmental objective, the interests supporting protection were much greater if his statements were true or reasonable than if they were baseless, false or reckless. *Greer*, 212 F.3d at 373. (Pet.-Ap. 25a.) Further, because the truth of his statements was critical to the *Pickering* balance, the PFC was obliged to examine that issue as part of a reasonable investigation. *Greer*, 212 F.3d at 368. (Pet.-Ap. 15a.) (*See Waters*, 511 U.S. at 667 - 68. *Waters* was limited to "at will" employments. *Id.*, 511 U.S. at 671. The Seventh Circuit has applied *Waters*' "reasonable investigation" rationale to employments such as Greer's involving Fourteenth Amendment property interests. *Weicherding v. Riegel*, 160 F.3d 1139, 1143 (7th Cir. 1998).)

Defendants bear the burden of proving that an employee's statements are baseless. *See, Pickering*, 391 U.S. at 574 and *Rankin*, 483 U.S. at 388. Despite that burden, the Department offered only conclusory statements, and presented no evidence that the News Release was recklessly, intentionally or even negligently false. When Greer himself attempted to prove that his statements were true and reasonable, Amesqua and the Department moved to exclude his evidence, arguing that they did not address a matter of public concern and that their truth was irrelevant to the *Pickering* balance. In direct contradiction to her motion, Amesqua herself admitted that if Greer's allegations were true, someone "ought to blow the whistle."

(Hearing Transcript, 10/1/97, Pet.-Ap. 185a.) Saxe also concluded in his investigation report that Greer's statements, "if true," would "warrant suit against the City before the Equal Rights Division and/or charges filed against [Amesqua] before the PFC." (Saxe Investigation Memorandum, 6/5/97, Pet.-Ap. 182a.)

Despite ruling that Greer's statements did address a matter of public concern, the PFC granted the Department's motion, excluding as irrelevant all evidence regarding the "accuracy" or "empirical soundness" of Greer's statements except his "actual knowledge." (Hearing Transcript, 10/14/97, Pet.-Ap. 185a.) In a decision inconsistent with its own ruling to admit Greer's "actual knowledge," the Commission even excluded the videotape of the incident broadcast by the television station which Greer had seen and which was one of the principal bases for his comments in the News Release. (Dean Affidavit, ¶ 4, Pet.-Ap. 187a.) Remarkably, the PFC terminated Greer for making "uninformed and uninformative" statements about the videotape, yet admitted that they themselves never even reviewed or discussed the tape during their deliberations after the hearing. (PFC Decision and Order Terminating Petitioner, Pet.-Ap. 102a, Seeger Deposition, 5/4/99, Pet.-Ap. 190a, Mendoza Deposition,5/4/99, Pet.-Ap. 192a.)

At the PFC's direction, Greer submitted extensive offers of proof that his statements were true and well grounded in fact, including opinions of two nationally recognized experts, Chief George Friedell and Lt. Clarence Williams. Friedell was employed for thirty-five years by the New York City Fire Department, retired as a division commander of thirty-five fire companies, served for ten years as professor of fire science at City University New York (writing numerous courses in fire science) and now serves as instructor and consultant to legislative committees, insurance companies and other industries. (Friedell Offer of Proof, *vitae*, Pet.-Ap. 199.) Friedell concluded that Amesqua's decision, "at the very least,

smacks of favoritism." *Id.*, (Friedell Offer of Proof, letter attachment, Pet.-Ap. 196.) According to Friedell, Greer "had a right -- and perhaps a duty" to expose a situation which was "being downgraded and 'swept under the rug'." *Id.* He concluded that the "omissions by Amesqua clearly indicated a bias and predisposition [to] justify Holtz's conduct. . . . . [T]he strongest condemnation and severest sanctions of Holtz's conduct was warranted, not the justification provided by Amesqua." *Id.* (Friedell Offer of Proof, ¶ 20, Pet.-Ap. 194a and letter attachment, Pet.-Ap. 195a.)

Clarence Williams served twenty-five years with the City of Seattle Fire Department, is past president of the International Association of Professional Black Fire Fighters ("IABPFF"), was a member of the Joint Council of National Fire Service Organizations, and served as secretary of the twelve member Committee on Accreditation for the National Fire Protection Association ("NFPA"), the professional agency that certifies all state fire service training programs. Williams has experience in hundreds of discrimination cases as investigator, consultant, expert witness, affirmative action officer and IABPFF president. (Williams Offer of Proof, *vitae*, Pet.-Ap. 174a - 75a). He was a prevailing party in *Church v. City of Seattle,* 499 U.S. 901 (1991) and, as IABPFF president, he coordinated political, logistical and *amicus* activities in *Local No. 93, International Association of Firefighters, AFL-CIO C.L.C. v. City of Cleveland, et al.*, 478 U.S. 501 (1986). Williams stated that the videotape alone was sufficient to establish that Holtz's actions were violent, excessive and abusive, and violated generally accepted standards for conduct by command officers." *Id.* (Williams Offer of Proof, ¶ 5, Pet.-Ap. 171a). He also stated that he would have denied NFPA certification for the Department had he observed Holtz's conduct, *id.*, and stated further that

> [A] male command officer engaging in such conduct against a female recruit would have been summarily

> dismissed from his position. . . . . [T]here is a clear likelihood of favoritism by Chief Amesqua, both in granting favorable assessments that were *not* warranted and withholding severe professional sanctions which *were* warranted.

Id. (Emphasis original.) Williams also concluded that, "In this case, there is clearly sufficient information . . . to justify a legitimate inquiry whether favoritism occurred based on the factors questioned by Greer in the News Release." *Id.*

Greer and Conway also submitted offers of proof based on their training and long experience as firefighters. Greer provided a detailed, reasonable basis for each statement in the News Release questioning the propriety of Amesqua's conduct. (Greer Offer of Proof, Pet.-Ap. 129a.) Saxe himself confirmed Greer's credibility, stating, "Ron is a lot of things, but he is not a liar." (Hearing Transcript, 2/3/98, Pet.-Ap. 200a.) Conway also stated that the videotape alone was clear evidence that Holtz had violated numerous Department work rules and policies. (Conway Offer of Proof, ¶¶ 5-6, Pet.-Ap. 158a.)

D. District Court Decision.

Following his termination, Greer commenced this action under 42 U.S.C. § 1983 to enjoin the termination and recover damages. In a published decision, the district court denied Greer's motion for a preliminary injunction. *Greer*, 22 F.Supp.2d at 918 (Pet.-Ap. 61a). The court noted that "exposure of wrongdoing by public officials" is a "classic" matter of public concern and that "[e]xposing a fire chief's alleged favoritism toward a subordinate officer falls into this category." *Id.*, 22 F.Supp. 2d at 927 (Pet.-Ap. 82a). However, the court dismissed entirely Greer's argument that the interests favoring protection were greater if they were true or reasonable and gave "no weight to . . . the 'truth' of his comment that Holtz's conduct is considered unacceptable in professional circles. . ." *Id.*, 22 F.Supp.2d at 930 (Pet.-Ap. 89a). The court

held that the Department was justified in removing "from its ranks a line firefighter who sends a news release to local media that challenges his chief's decision making on an internal personnel matter and speculates about her sexual orientation and that of another command officer." *Id.*, 22 F.Supp.2d at 929 (Pet.-Ap. 87a).

Thereafter, both parties moved for summary judgment. Respondents' evidentiary submissions consisted almost exclusively of Greer's deposition and Amesqua's affidavit which were created during the federal action over one year after the PFC completed its investigation and which were neither presented to nor relied upon by the PFC in its termination decision. Because a court's review of an employer's discharge decision is limited to "the facts as the employer reasonably found them to be," *Waters*, 511 U.S. at 667, Greer argued that, except for very limited evidence which was actually presented at the discharge hearing, all other evidence referenced from the deposition and affidavit was not relevant, and the court should have summarily denied respondents' motion.

The court agreed that it should "limit analysis of Plaintiff's First Amendment claim to the facts as reasonably found by the commission at the time it made its decision" and to "the record before the commission." (Decision and Order of the District Court Granting Summary Judgment, Pet.-Ap. 28a - 29a.) But in contravention of its own statements, the most basic rudiments of due process and the procedural requirements of *Waters*, the court granted respondents' motion, supporting its decision with an extensive recitation of facts from the deposition and affidavit. (*Id.*, Pet.Ap. 30a-31a.) The court's factual recitation included not only Greer's personal views on homosexuality elicited in the deposition, but also details of Greer's work and discipline history which were far beyond the cursory details contained in Department's submissions to the PFC. Those submissions consisted of only a single page from a prior PFC decision against Greer and a minimal summary of

discipline records of all employees. (PFC Decision and Order Suspending Petitioner, Pet.-Ap. 201a, Employee Discipline Summary, Pet.-Ap. 203a.)

As he had in the PFC and injunction hearings, Greer argued that if his statements about favoritism were true or reasonable, then the interest in exposing official wrongdoing was entitled to critical weight in balancing the competing interests. The court again rejected Greer's argument. "Contrary to plaintiff's assertions, the truth or falsity of the employee's speech is not necessarily a critical factor in public employee free speech cases generally and it is irrelevant in this case. (Citations omitted.)" (Decision and Order of the District Court Granting Summary Judgment, Pet.-Ap. 42a.) The court characterized *Wright v. Illinois Department of Children & Family Services*, 40 F.3d 1492 (7th Cir. 1994) as providing for a heightened interest in a statement's veracity only when the speech consists of sworn testimony. (Decision and Order of the District Court Granting Summary Judgment, Pet.-Ap. 43a.)

E. Seventh Circuit Decision.

On appeal, Greer raised three critical, threshold issues: (1) the district court permitted respondents' exclusive reliance on evidence neither presented nor relied on during the *Waters* investigation, (2) it approved the PFC's refusal to consider the truth of Greer's statements in conducting the *Pickering* balance, and (3) it found that even absent consideration whether Amesqua engaged in illegal discrimination, the PFC's investigation was "reasonable" as required by *Waters*.[2]

Remarkably, the court of appeals cited extensively from respondents' extra-record submissions without acknowledging

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[2] Greer also raised several other due process and equal protection challenges. Those were not Greer's primary issues on appeal, and are not addressed in this petition.

even that Greer challenged the propriety of that evidence. Just as in the district court, Greer's opinions which the court of appeals found horrific (such as his comparison of homosexuality to pedophilia and infidelity, *Greer*, 212 F.3d at 363 (Pet.-Ap. 4a)) were his personal views elicited in his deposition.

Addressing the *Pickering* test, the court did agree that "Whether public officials are operating the government ethically and legally is a quintessential issue of public concern." *Greer*, 212 F.3d at 371 (citations omitted) (Pet.-Ap. 21a). However, the court mischaracterized Greer's balancing argument as a claim that the truth of his statements made them "absolutely protected." *Id.*, 212 F.3d at 368. (Pet.-Ap. 25a.). Certainly mere truth does not provide *carte blanche* protection, but neither does it follow that truth is not relevant at all. If that were so, a legitimate whistle blower could be fired by a corrupt employer who is the very target of the employee's charges, all without any consideration whether the charges are true. Yet the court not only excused the PFC from considering whether Greer's charges were true or reasonable, it even approved prohibiting him from presenting his *own* evidence that they were.

The exclusion of Greer's evidence was particularly unfair because, indulging every conceivable inference *against* Greer, the court dismissed his statements as "unsubstantiated suspicions," *Id.*, 212 F.3d at 372 (Pet.-Ap. 22a), yet refused to consider his offers of proof. (Given the court's refusal to consider Greer's evidence, it is difficult to conceive how his statements could have been anything *other* than "unsubstantiated.")

For example,[3] the court criticized Greer's assertion that Amesqua had a "radical agenda," *id.*, yet refused to consider his offer of proof that after assuming command, Amesqua herself repeatedly called her own views "radical." In a WFS publication, *WFS Quarterly*, Winter, 1996, Amesqua stated, "We're going to have to re-engineer the fire service. You don't do this by locking yourself in to traditional thinking. We need radical, creative thinking." (Greer Offer of Proof, ¶ 20, Pet.-Ap. 147a.) Amesqua had also contracted with WFS to implement Values Enhanced Recruit Training ("VERT"). VERT was a program WFS itself had developed which, instead of simply training recruits in traditional fire suppression skills, was designed to change their personal values, social attitudes and viewpoints. *Id.*

The court also criticized Greer for "speculation" that Holtz and Amesqua were lesbians. *Id.* Yet it refused to consider Greer's offer of proof that they both displayed "gay liberation" bumper stickers on their cars, that Holtz was very open about her sexual orientation and about her relationship with Terese Floren who was executive director of WFS, that their orientation was widely discussed among Department members including the personnel chief, and that when an assistant chief sued the PFC for appointing Amesqua chief instead of him, a local paper carried the banner headline," Vorlander: Fire officials sought lesbian." (Greer Offer of Proof, ¶ 18, Pet.-Ap. 137a, Capital Times Article, 8/28/96, Pet.-Ap. 204a.) And although the court accepted and relied on respondents' extra-record submissions in finding Greer's statements baseless, it refused to consider Greer's extra-record submissions filed in response, which stated that Amesqua brought her companion to a press conference where the woman personally stated to Greer,

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[3] Three of the court of appeals' criticisms are presented for the sake of illustration. Greer submitted evidence addressing each of the court's other criticisms, as well.

"I'm her [Amesqua's] partner." (Greer Affidavit, ¶ 48, Pet.-Ap. 207a.) Even more important, the court failed to acknowledge that, as high profile commanding officers, both Amesqua and Holtz were public figures and subject to a much broader degree of public scrutiny. *See generally, New York Times v. Sullivan*, 376 U.S. 254 (1964).

The court further chided Greer for failing to lodge his complaints by the "proper manner and means" and for being "unwilling to let the firefighter's union address the matter . . . ." *Greer*, 212 F.3d at 371. (Pet.-Ap. 22.) Yet the court ignored Greer's proof that Amesqua had stonewalled Local 311 for over six months (*see* exchange of correspondence and Conway Offer of Proof, Pet.-Ap. 154a, 156a, 157a, 165a, 166a, 167a, 178a), that the PFC and other authorities did nothing during that time despite being aware of the situation, and that Chief Friedell concluded that it was Greer's "right" and perhaps his "duty" to expose the situation given the failure of Amesqua and the PFC to take "proper actions" and the token "slap on the wrist" ordered by Amesqua. (Friedell Offer of Proof, Pet.-Ap. 196a.)

Finally, addressing the investigation requirements under *Waters*, the court of appeals ruled that, despite the PFC's refusal to consider the truth of Greer's statements, its investigation was "quite sufficient under [the *Waters*] standard, and Greer enjoyed adequate opportunity to respond to the charges against him." *Greer*, 212 F.3d at 368. (Pet.-Ap. 15a.) It concluded, "The PFC needed only to ascertain a reasonable basis for finding whether Greer had violated Department rules, and '[only]' procedures outside the range of what a reasonable manager would use may be condemned as unreasonable." *Id.*, 212 F.3d at 363 (citing *Waters*, 511 U.S. at 678). (Pet.-Ap. 15a.) However, as noted already, if the truth of Greer's statements was relevant and essential to the *Pickering* balance, then investigating and considering the truth was likewise essential to the PFC investigation under *Waters*.

REASONS FOR GRANTING THE PETITION

I. THE DECISION OF THE COURT OF APPEALS CONFLICTS WITH DECISIONS OF OTHER CIRCUITS AND ITS OWN PRIOR HOLDINGS.

Ultimately, the court of appeals refused to consider the truth of Greer's statements. It concluded as dispositive that the Department's interest in preventing disruption and promoting "government efficiency" and "workplace morale" outweighed Greer's interests, *Greer*, 212 F.3d at 372 (Pet.-Ap. 24a), and that the PFC's "predictions of disruption" were entitled to "substantial weight," even though the News Release did not cause any actual disruption. *Id.*, 212 F.3d at 373. (Pet.-Ap. 24a.)[4] This holding is in direct conflict with the holdings of other circuits, which have determined without exception that the truth of a whistle blower's statements is relevant to the *Pickering* balance.

The Fifth Circuit is most emphatic, stating in *Porter v. Califano*, 592 F.2d 770 (5th Cir., 1979),

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[4] Again, although the court relied on respondents' extra-record submissions to support the Department's predictions of disruption, it refused to consider Greer's extra-record submissions to the contrary. After Greer was terminated, Amesqua's own arbitrary and discriminatory management (including her patent favoritism towards Holtz in reviewing Holtz's abuse of Cato and several other personnel) led Local 311 to issue a scathing indictment of Amesqua's leadership titled the "Local 311 Report." Following the report, Local 311 conducted an unprecedented, highly publicized, overwhelming vote of no confidence against Amesqua. (Greer Affidavit, ¶¶ 51, 152, 155, Pet.-Ap. 208a - 212a). Had the PFC investigated and acted upon the Greer's legitimate complaints about Amesqua's favoritism instead of "killing the messenger," the catastrophic disruption might well have been avoided.

> The First Amendment balancing test can hardly be *controlled* by a finding that disruption did occur. An employee who *accurately* exposes rampant corruption in her office no doubt may disrupt and demoralize much of the office. But it would be *absurd* to hold the First Amendment generally authorizes corrupt officials to punish subordinates who blow the whistle simply because the speech somewhat disrupted the office.

Id., 592 F.2d at 773 - 74. (Emphases added.) In *Brawner v. City of Richardson*, 855 F.2d 187 (5th Cir., 1988), the court also concluded that

> If the allegations of internal misconduct are indeed true, [the employee's] statements could not have adversely affected the proper functioning of the department *Porter v. Califano*, 592 F.2d 770 (5th Cir., 1979), since the statements were made for the very reason that the department was not functioning properly due to corruption.

Id., 855 F.2d at 192. Considering a whistle blower's criticism in a prison setting, it said, "[W]hen weighed against the exposure of unethical medical practices affecting hundreds of inmates, the disruption is a minimal interest." *Frazier v. King*, 873 F.2d 820 (5th Cir., 1989), *cert. den., Davoli v. Frazier*, 493 U.S. 977 (1989).

The Third Circuit adopted the Fifth Circuit's strong *Porter* language in both *Czurlanis v. Albanese*, 721 F.2d 98, 105 (3d Cir. 1983) and *O'Donnell v. Yanchulis*, 875 F.2d 1059 (3rd Cir. 1989). In *O'Donnell*, the court stated, "The public has a significant interest in encouraging legitimate whistle blowing so that it may receive and evaluate information concerning the alleged abuses of these public officials." *Id.*, 875 at 1062.

The First Circuit also explicitly recognizes that the interests in protecting employee's statements increase in relation to the truth and sincerity of the statements. In *Brasslett v. Cota*, 761

F.2d 827 (1st Cir.1985), the mayor and town council terminated the fire chief for criticizing the condition of department trucks during a televised interview. *Id.*, 761 F.2d at 831 - 32. The court held that the truth of the chief's statements was critical: "[A]n employer has a greater interest in curtailing erroneous statements than correct ones, and still a greater interest in curtailing deliberate falsehoods. . . . . *Correspondingly, an employee's interest in making public statements is heightened according to their veracity . . . .*" *Id.*, 761 F.2d at 839 (emphasis added). Citing *Pickering*, the First Circuit also held in *Santos v. Miami Region, United States Customs Service*, 642 F.2d 21 (1st Cir. 1985) that "In those circumstances in which the employee's critical comments 'on matters of public concern,' [*Pickering*], " 391 U.S. at 570 . . . are "substantially correct," *Id.*, they cannot "furnish grounds for dismissal."*Santos*, 642 F.2d at 25 (citations omitted).

In *Johnson*, the Ninth Circuit also outlines a "sliding scale" based on the relative truth and sincerity of the employee's statements. It observed that there is a "very limited" interest in protecting even recklessly false statements in order to create "breathing space" for robust public debate, but "The First Amendment interest in protecting merely inaccurate statements made in good faith . . is a good deal stronger." *Johnson*, 48 F.3d at 426, n. 5 (citations omitted). In *Roth v. Veterans Admin.*, 856 F.2d 1401 (9th. Cir., 1988), the court stated, "We would expect 'whistleblowing,' by its very nature, to engender some hostility and resistance." *Id.* 856 F.2d at 1407. The court then incorporated the Fifth Circuit's holding in *Porter* that it would be "absurd" to believe that the First Amendment authorizes corrupt officials to punish legitimate whistle blowers. *Roth*, 856 F.2d at 1407 - 1408 (citing *Porter*, 592 F.2d at 773 - 74).

The Tenth Circuit, considering a police officer's accusations of misconduct by fellow officers, stated, "When balancing the rights of the employee against those of the employer, an

employee's First Amendment interest is entitled to greater weight where he is acting as a whistle blower in exposing government corruption." *Lytle v. City of Haysville*, 138 F.3d 857, 865 (10th Cir. 1998). Correspondingly, "[A] government employee's interest in whistleblowing is entitled to little weight if a reasonable person in his shoes would not have believed that there was government corruption or wrongdoing." *Id.*, 138 F.3d at 866 (citations omitted). As Greer urged in this case, the court concluded that "under the *Pickering* inquiry, we must consider whether there was a reasonable basis for [the officer's] allegations . . . ."*Id.*, 138 F.3d at 866.

The *Greer* decision creates confusion even within the Seventh Circuit. In *Wright v. Ill. Dept. of Children & Family Services*, 40 F.3d 1492 (7th Cir., 1994), the plaintiff was fired for criticizing her superiors while testifying in a juvenile hearing. Citing *Waters*, 511 U.S. 667 *Wright* held that First Amendment protection did not "*directly* hinge on the accuracy of her utterances" because her employers could punish her if they "reasonably believed after an *adequate* investigation, that her testimony was false, even if it actually was true . . . ."*Id.*, 40 F.3d at 1506. (Emphases added.)

The court distinguished *Wright* from Greer's case by holding that an employee has an "enhanced interest in telling the truth when sworn to do so before 'an official government adjudicatory or fact-finding body . . . .'" *Greer*, 212 F.3d at 373 (Pet.-Ap. 25a). *Wright* does hold that the interests in protecting subpoenaed testimony are "compelling" if the speech is truthful, *Wright*, 40 F.3d at 1505, but it does not follow that interests in truth are non-existent for any other kind of speech. Further, the court's distinction conflicts with *Wright* itself. Following *Brasslett* and *O'Connor v. Steeves*, 994 F.2d 905, 912 (1st Cir. 1993), *cert. denied*, 510 U.S. 1024 (1993) (neither of which involved sworn testimony), the Seventh Circuit stated in *Wright*,

> As the First Circuit has recognized, "an employer has a greater interest in curtailing erroneous statements than correct ones, and still a greater interest in curtailing deliberate falsehoods," and "[c]orrespondingly, an employee's interest in making public statements is heightened according to their veracity." *Id.* (citing *Brasslett v. Cota*, 761 F.2d 827, 839 (1st Cir.1985)). Following from this analysis, it would be proper for a court to further distinguish between negligent inaccuracies and malicious falsehoods for purposes of applying the *Pickering* test.

Wright, 40 F.3d at 1505 – 1506. (*O'Connor*, 994 F.2d at 912, *cert. denied*, 510 U.S. 1024 (1993) (citations to *Brasslett* included).

Wright also relied on Seventh Circuit precedent, *Feldman v. Bahn*, 12 F.3d 730 (7th Cir. 1993), *cert. den.*, 513 U.S. 1014 (1994), in which a state university professor's contract was not renewed after he accused a colleague of plagiarism. Again, adjudicatory testimony was not at issue. As urged by Greer in this case, the court described a "sliding scale" based on veracity and sincerity, stating,

> On receiving a charge of intellectual dishonesty, a university should investigate. . . . . If the charge is correct, the plagiarist should be disciplined; if the charge is unfounded, the accuser should be disciplined; if there is some basis for the charge, but the university believes that the accusation is unproven, then no one should be disciplined . . . . *Which of these three outcomes is appropriate depends . . . on the truth of the accusation and the care the accuser took before making it.*

Feldman v. Bahn, 12 F.3d at 731 (emphasis added).

And in *Marshall v. Allen*, 984 F.2d 787 (7th Cir., 1993), a housing authority employee was discharged for statements that his employer engaged in illegal gender based discrimination.

The court held that "if Mr. Marshall's allegations are true, defendants would have violated his constitutional rights when they discharged him." *Id.*, 984 F.2d at 794. Like Greer's allegations of illegal discrimination in this case, Marshall's allegations of discrimination were not sworn testimony, either.

In summary, the court of appeals decision in this case sets a troubling precedent in disharmony with the overwhelming authority of other circuits and with numerous decisions in its own case law.

II. THIS CASE PRESENTS IMPORTANT CONSTITUTIONAL QUESTIONS

It is difficult to conceive an issue more essential to democratic government than the protection of employees who expose corruption and malfeasance within its agencies. While *Pickering* and *Waters* provide a functional rubric for employee speech cases generally, this case presents an exceptional opportunity to provide guidance for the circuits on several critical issues arising from employee claims of retaliation for legitimate whistle blowing.

An enormous body of literature has developed from this Court's "reckless or false" comment in *Pickering*. While that comment has provided general guidance for over three decades, the circuits have developed conflicting doctrines governing the significance of the truth of employee statements. Citing *Johnson*, 48 F.3d at 424-25, the district court noted that the circuits are split on whether reckless, profane or disparaging statements are unprotected *per se*. *Greer*, 22 F.Supp.2d at 928. (Pet.-Ap. 90a.) Discussing *Brenner v. Brown*, 36 F.3d 18, 20 (7th Cir. 1994) (*per curiam*), the court concluded that the Seventh Circuit considers them unprotected *per se*, and also questions whether an employee's speech is protected even if he has "reliable but second hand knowledge" rather than "first hand knowledge" of the incident he comments on. *Id.*

One commentator has noted that this Court "has not resolved the question of when, if ever, recklessly or knowingly false statements of public employees about matters of public concern are protected by the Constitution." Howard C. Nielson, Jr., *Recklessly False Statements in the Public-Employment Context*, 63 U.Chi.L. Rev. 1277-78 (1996). The circuits have developed two conflicting approaches to that issue, one holding recklessly false statements unprotected *per se* and the other providing a variety of circumstances under which such speech might be protected. *Id.*

In light of such fundamental disagreement over the function of "veracity" and "sincerity," the circuits would be well served by developing a more comprehensive structure for analyzing those factors, especially in the critical context of whistle blower cases. That is, in applying the *Pickering* balance, what is the significance of the employee statements' relative basis in fact? Are they true, false, or somewhere in between? And what is the significance of the speaker's care in making them? Was he careful, reckless, or somewhere in between? The focal issues and well-developed, detailed record in this case present an exceptional opportunity to develop such a structure.

This case also presents the first opportunity for this court to apply the *Pickering* balance in the context of allegations of discrimination based on sexual orientation. As more states and municipalities adopt proscriptions against discrimination on that basis, and as more homosexuals achieve upper management positions, it is to be expected that (as in this case) scrutiny for illegal favoritism based on sexual orientation will also increase. As noted in the lower court decisions, because of negative societal views of homosexuality, such scrutiny raises a "privacy" concern. This case presents an excellent opportunity to determine whether "privacy" may be a significant government interest in the *Pickering* balance and whether homosexuals in management positions will be excepted to some degree from the same scrutiny and "public

figure" analysis as other management personnel accused of illegal discrimination based on race and gender.

This case also illustrates a critical need for additional procedural guidance in applying the *Waters* requirement of a reasonable investigation -- both for employers conducting the investigation and for courts reviewing the employer's conduct in subsequent civil rights actions. In this case, by approving the employer's reliance in district court on evidence it neither considered nor relied on in its investigation, the courts virtually gutted the *Waters* requirement that the employer base its discharge decision on facts determined *at the time of its investigation*. *Waters*, 511 U.S. at 667. If the procedure approved in this case is allowed to stand, *Waters* will be meaningless. Besides being excused from investigating whether a whistle blower's statements have any merit, an employer may simply fire the employee and, when later challenged in a civil rights action, develop a *post hoc* justification based on evidence not present at the time of the discharge.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

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IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 99-2767.

RONNIE B. GREER,

Plaintiff-Appellant,

v.

DEBRA H. AMESQUA, ALAN SEEGER, MARGARET MACMURRAY, BYRON BISHOP, LYNN HOBBIE, MARIO MENDOZA, THE CITY OF MADISON FIRE DEPARTMENT, THE CITY OF MADISON, THE CITY OF MADISON POLICE & FIRE COMMISSION, AND WISCONSIN MUNICIPAL MUTUAL INSURANCE COMPANY,

Defendants-Respondents.

Appeal from the United States District Court
for the Western District of Wisconsin.
No. 98 C 560- Barbara B. Crabb, *Judge.*

ARGUED JANUARY 21, 2000-DECIDED MAY 9, 2000

Before BAUER, RIPPLE and KANNE, *Circuit Judges.*

KANNE, *Circuit Judge.*

Plaintiff Ronnie Greer is never shy about speaking his mind,

and he doesn't think highly of his former boss Debra Amesqua. While he was a firefighter for the City of Madison, Wisconsin, Greer publicly condemned Amesqua's appointment as fire department chief and attended her swearing-in ceremony carrying a protest sign. Greer already had a long disciplinary history with the fire department, and when he distributed a "news release" to local newspapers accusing Amesqua of favoritism to homosexuals and of executing a radical lesbian agenda as fire chief, the department terminated his employment. Greer sued Amesqua, the fire department and the City of Madison among others for violating his due process, equal protection and First Amendment rights in discharging him, but the district court granted the defendants' motion for summary judgment. Greer appeals, and we affirm.

I. HISTORY

Ronnie Greer has compiled an eventful disciplinary history with the City of Madison Fire Department ("Department") since his hiring in 1981. During the 1980s, Greer was reprimanded for chronic tardiness and disciplined at least twice for insubordination after shouting matches with superior officers. Greer also quarreled with Chief Earle Roberts, Amesqua's predecessor, over two separate but related issues. Greer refused to submit to Department shaving inspections and filed a complaint with the Wisconsin Equal Rights Division ("ERD"). Around the same time, Greer told newspaper reporters that Chief Roberts and the mayor were deceiving the public by announcing that the hazardous materials protection team was ready for action. Greer told reporters that, contrary to the chief and mayor's claim, the team was unequipped, untrained and unprepared for emergency calls. The Department removed Greer from the hazardous materials team, and Greer sued the Department for employment retaliation in violation of his First Amendment rights. The Department and Greer agreed to settle

both the ERD complaint and the federal lawsuit for $18,500.

In 1996, Greer received a letter of reprimand and was docked pay for being absent without leave or permission. The Department also began disciplinary proceedings against Greer for religious speech in the workplace but later dropped the investigation. Then, Greer had an argument with Assistant Chief Fred Kinney over Greer's misuse of sick pay and was suspended for three days. Greer appealed this suspension to the Board of Police and Fire Commissioners of the City of Madison ("PFC"), but the PFC affirmed the suspension. Finally, in late 1996, Greer disseminated a pamphlet entitled "Homosexuality: The Truth" to fellow firefighters in his station. The pamphlets referred to homosexuality as a "filthy scourge" and blamed gays for disease and child molestation. On November 27, 1996, Amesqua suspended Greer for three months without pay and wrote Greer that "your disciplinary record is extremely poor. The sanction I am imposing is a last-ditch attempt to get you to alter your ways. You should fully appreciate that any further breaches of our standards could well result in your termination." On June 25, 1997, after Greer appealed, the PFC noted Greer's "uniquely abysmal and disheartening" disciplinary record, found that Greer's pamphleteering constituted workplace harassment and upheld Greer's suspension. The PFC commented that Greer's record reflected his "persistent incapacity to conform himself consistently to the appropriate requirements of ordinary civil conduct" and warned that it was "not overly confident that this discipline will accomplish a change in [Greer's] pattern of conduct. However, [the PFC is] confident that [it] will not suspend him again."

Greer bitterly objected to Amesqua's appointment. Greer believed that Amesqua was unqualified for the job and that the Department had hired her over more qualified candidates.

Amesqua is a Native American woman who Greer believed to be homosexual, and Greer credited her appointment to affirmative action rather than to her substantive qualifications. Greer opposed affirmative action in the Department, and on several occasions, Greer complained personally to the mayor of Madison about hiring discrimination and Amesqua. At the press conference announcing Amesqua's hiring, Greer told reporters that Amesqua was unqualified and the Department might have engaged in "something that was illegal" in hiring her and "purposely overlook[ing] other qualified candidates." Greer also attended Amesqua's swearing-in ceremony as the lone vocal dissenter, bearing a large placard declaring "Injustice is just wrong. Not affirmative action" on its face and "When does wrong become right?" on its back. Greer admits that he has been publicly critical of Amesqua more than fifty times since her appointment.

Greer also believed that Amesqua lacked character and leadership ability because she is a lesbian. Indeed, Greer could be fairly characterized as an anti-homosexuality crusader. As pastor for the thirty-member Trinity Evangelical Church, Greer inveighed against the sins and evils of homosexuality. One newspaper article profiling Greer described him as a "Madison firefighter whose personal mission is to wipe homosexuality from our midst" and explained that Greer has been "called a hate-monger and a malcontent unable to obey authority" by some and "a person of integrity who put his own job on the line to fight for civil rights" by others. Greer deemed homosexuality to be "a perversion, and usually sexual perversion is related to someone's character." He compared it to "pedophilia or some guy sleep[ing] around with different women when he's married, it's a character issue." He questioned whether homosexuals should be permitted to hold positions of authority because he considered homosexuality to be "destructive to the individual and as well as society."

All this came to a head in late 1996, less than a year after Amesqua's appointment. On November 5, 1996, a local television station aired video of Division Chief Marcia Holtz making physical contact and screaming at recruit Ron Cato during a training session. Six days later, the firefighters' union formally requested that Holtz be suspended and reprimanded for the incident with Cato ("Holtz-Cato incident"), and Amesqua assigned Assistant Chief Bill Spohn to investigate the charge. On April 9, 1997, amid local media scrutiny, Amesqua announced that Spohn's investigation found Holtz's conduct was "not unreasonable under the totality of the circumstances," but extended Holtz's probation for six months and ordered her to attend a leadership class.

Since Holtz is a lesbian, Greer predictably was appalled by Amesqua's decision and suspected favoritism. On April 28, 1997, Greer faxed the following self- styled "news release" to a number of local media outlets, including both major Madison newspapers:

News Release
Homosexual Chief rewards Homosexual
Chief for Assault?

Fire Chief Debra Amesqua has issued a decision on the investigation of an incident involving Training Chief Marcia Holtz and a fired firefighter trainee. In the incident, recorded by WMTV News-15 in October 1996, Chief Holtz shoved and screamed at the trainee during a training exercise. An investigation was ordered and a decision based on the investigation was issued on April 9, 1997. It is Chief Amesqua's conclusion that the "questionable measures" (shoving & screaming) used by chief Holtz were not "unreasonable", and that she simply "needs further guidance and training". That training is to

be accomplished by "attending an advance leadership class", a training program which is coveted by other chief officers to the extent that there is a "waiting list" to get in! She has also called for a 6 month extension of chief Holtz's probationary period, something she (Chief Holtz) herself appears to have suggested.

Now this would be laughable it were not such a serious matter. A senior officer in essence, physically and verbally assaults an employee and Chief Amesqua finds that "not unreasonable" and that her screaming was "professional in content and germane". In over 17 years of firefighting with both experienced and non-experienced firefighters, I don't believe I've ever seen a situation where it was necessary to physically assault anyone to get their attention or to instruct them. Granted it is often necessary to make physical contact in a fire situation to initiate communication with another firefighter, but never to the extent as we have seen in this incident. So what's so special or different about this case?

I said in October that this matter would be "down played", "swept over" and nothing significant would be done about it. A lot of my fellow firefighters doubted my "prediction". Well, time has "told the story". One does not need to be a prophet, just someone willing to see things as they are.

Consider the following. One would think that if you wanted to achieve clear facts in investigating a matter of this type it would be only proper to have that investigation done by an independent, disinterested party. However, that is not the case here. The investigation was done by another Division Chief who is a subordinate to Chief Amesqua and a staff member with Division Chief

Holtz. Is it possible that the investigating officer could have been unduly influenced? Or could the conclusions of the investigation be simply disregarded without opposition by that subordinate?

The relationship between Chief Amesqua and Chief Holtz goes back a ways, namely through their affiliation with an organization called "Women In Fire", an organization seen by most firefighters in this area as a predominantly homosexual organization. Is it possible that some favoritism has been shown here to a fellow member or possible friend? Both are homosexual women, who have been seen in the past (and still now among many), with clear agendas as it concerns women in the fire service. Could it be that their radical agendas has come to play to the extent that even violence can be excused and "glossed over", or in this case, rewarded? Sounds a lot like the much assailed "good- ol-boy" system revived, repainted and given another name.

Now, I'm confused and maybe someone could make sense of this for me; It's not okay to communicate verbally my views on a department chief officer's handling an issue but it's okay to use physical force to communicate with a trainee? Maybe I'm missing something! The department/city is willing to spend thousands of dollars on a case of an alleged comment without proof, on alleged harassment without a complaint or proof, and on an alleged rule violation without action or proof, but "winks" at and rewards physical assault?

Another firefighter is given a disciplinary letter and has the same placed in his employment file because he made a remark regarding homosexuals. He was "off-duty" and

happened to stop by the fire station. A letter of discipline?

A fire officer is facing a 12 hour suspension for angrily making comments to a uniform delivery driver whom he is familiar with. A 12 hour suspension?

But yet, it's not unreasonable for a chief officer in anger to physically handle an employee? Imagine if it were a white male chief officer shoving and screaming at a female recruit. Heads would have rolled! So much for fair treatment and equity! Go figure.

Oh, by the way, that male trainee who was the victim, he was mysteriously "let-go" literally days before graduating from the fire academy. Makes you go, "Hmm."

The *Capital Times*, a Madison newspaper, received Greer's facsimile and printed the following article on the front page of the Local/State section in its May 1, 1997 edition:

Greer says fire chief plays gay games

Madison firefighter Ron Greer has lobbed another Molotov cocktail at his boss, this time accusing Fire Chief Debra Amesqua of meting out lax discipline to a female assistant fire chief.

He also insinuates that it's a lesbian conspiracy.

In a press release titled "Homosexual chief rewards homosexual chief for assault?" Greer implies that Amesqua showed favoritism in an investigation of Assistant Chief Marcia Holtz.

Holtz was accused of using excessive force on a recruit during a live fire training exercise last October.

Neither Amesqua nor Holtz has said anything publicly about their sexual orientations, whether they're gay or straight.

* * *

Greer, a pastor of a conservative Christian church, has become an anti-gay crusader. He has attacked the chief publicly ever since she came to Madison in January 1996.

Saying Amesqua was unqualified, Greer carried a protest sign when she was sworn in.

Greer himself is facing discipline for insubordination and for handing out anti-gay literature at work. The Madison Police and Fire Commission held roughly 20 hours of hearings on Greer's case and is expected to rule in a few months.

* * *

According to his press release, he concluded that the two women are homosexual apparently because they both belong to a group "Women in Fire," an erroneous reference to the Madison-based group Women in the Fire Service.

The organization "is seen by most firefighters in this area as a predominantly homosexual organization," Greer's press release said.

"Could it be that their radical agenda has come to play to the extent that even violence can be excused and 'glossed over,' or in this case, rewarded?" the release said.

Amesqua directed Assistant Chief Carl Saxe to investigate Greer's news release. Greer confessed to Saxe that he had written and faxed the news release to the local media. Greer admitted that his knowledge about the Holtz- Cato incident derived completely from television reports and workplace gossip, but insisted that his news release "was only asking questions," not making accusatory insinuations. On June 5, 1997, Saxe filed his report with Amesqua and recommended that Greer be discharged based on his insubordination, continuing campaign to derogate the Department, disregard for Department rules and "unequivocal assertion of his continued right to do what he did." Saxe felt that Greer's news release charged that Amesqua was "not fit to be Chief because [she] violate[s] the law in [her] official capacity. If ever [Saxe had] seen conduct that brings the Department in disrepute, this is it." Saxe found that Greer's news release had violated Department Rules 18, 39, 51, 65 and Administrative Procedure Memorandum 3-5 ("APM 3-5"), prohibiting insubordination, harassment and bringing the Department into disrepute.[1]

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[1] Rule 18: Members shall be efficient and capable in the service and must not neglect their duty. They shall hold themselves in readiness, at all times, to answer the calls and obey the orders of their superior officers. They shall treat their superiors with respect.... They shall conform to the rules and regulations of the Department, observe the laws and ordinances, and render their services to the city with zeal, courage and discretion and fidelity.

Rule 39: Members must conform to and promptly and cheerfully obey all laws, ordinances, rules, regulations, and orders, whether general, special or verbal, when emanating from due authority.

Rule 51: Officers and members shall at all times conduct themselves so as not to bring the Department in disrepute.

However, Saxe found that Greer had not violated Department Rule 47, requiring employees to tell the truth, or Department Rule 50, barring false reporting and gossip, because Greer sincerely believed that the substance of his news release was true.

In a letter dated June 10, 1997, Amesqua adopted Saxe's findings and notified Greer that she would recommend to the PFC that, especially in light of his disciplinary history, he be terminated because his news release violated the aforementioned Department rules. She explained that Greer's news release was "equivalent to spitting in the Department's face" and his "continuing presence on the worksite can no longer be tolerated considering the open, notorious and personal way in which [he] attempt[s] to address [his] personal agenda." Amesqua filed formal charges with the PFC for disciplinary proceedings and recommended Greer's termination.

During an eight-day hearing, beginning on September 29, 1997, and ending March 19, 1998, Greer was represented by counsel, submitted evidence in his defense and had the opportunity to cross-examine witnesses against him, including Amesqua and Saxe. Amesqua explained during cross-examination that Greer was discharged because of his flagrant insubordination against her and Department leadership in

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Rule 65: Employees shall not harass co-employees because of their sexual orientation either by the use of derogatory verbal or written comments, graphic materials, gestures or conduct . . . .

APM 3-5: Any employee who shall engage in harassment on the basis of race, sex, religion, color, age, disability, national origin or sexual orientation ... is guilty of misconduct and shall be subject to remedial action, which may include the imposition of discipline up to and including discharge.

publicizing his unsupported suspicions to newspapers. In deciding to terminate Greer, Amesqua considered the news release, Saxe's report, Greer's personnel file, Greer's disciplinary record and the disciplinary records of other Department personnel. She observed that "[t]here is no one that has a work history or disciplinary history as bad as Ron Greer's." She also denied that she had ever publicly declared herself homosexual and reported that she had received numerous complaints from the public and firefighters about Greer, although she could not remember how many of these complaints related to the news release. Greer moved to introduce evidence contesting elements of his disciplinary record and moved for the recusal of several commissioners, pointing to a potential conflict of interest stemming from their involvement in an unrelated discrimination suit to which Greer was not a party nor otherwise involved. The PFC denied both of Greer's motions. On July 31, 1998, the PFC found just cause for termination under Department rules, Wisconsin law and federal law.

On August 5, 1998, Greer sued Amesqua, the individual commissioners of the PFC, the City of Madison, the Department and the City's insurer in district court under 42 U.S.C. § 1983 seeking damages and reinstatement for violation of his First Amendment, due process and equal protection rights. Greer waived his rights under Wisconsin law to appeal the PFC ruling to Wisconsin state court, see Wis. Stat. § 62.13(5)(I), and both Greer and the defendants filed cross-motions for summary judgment. On June 21, 1999, the district court granted summary judgment for the defendants on all three of Greer's claims, and Greer now appeals.

II. ANALYSIS

The district court granted summary judgment for the

defendants on all three of Greer's claims: (1) denial of procedural due process under the Fourteenth Amendment; (2) denial of equal protection under the Fourteenth Amendment; (3) employment termination in violation of the First Amendment. We review a grant of summary judgment *de novo*. *See Weicherding v. Riegel*, 160 F.3d 1139, 1142 (7th Cir.1998). Summary judgment is proper when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). In determining whether a genuine issue of material fact exists, we construe all facts in the light most favorable to the non-moving party and draw all reasonable and justifiable inferences in favor of that party. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986).

A. *Due Process*

The parties agree that Greer had a protected property interest in his continued employment with the Department, but Greer claims that the Department terminated his employment without granting him procedural due process under the Fourteenth Amendment because (1) his pretermination hearing was constitutionally inadequate; (2) three of five PFC commissioners were biased against him; and (3) the Department rules under which he was prosecuted did not give him prior notice of proscribed conduct.

1. *Pretermination Hearing*

Due process requires that the government employer provide a pretermination hearing in which the employee receives notice of the reasons for the prospective termination and has the

opportunity to respond to the charges. *See Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 546, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985). The hearing need not constitute a full evidentiary hearing that definitively resolves the propriety of the discharge, so long as it serves as "an initial check against mistaken decisions--essentially, a determination of whether there are reasonable grounds to believe that the charges against the employee are true and support the proposed action." *Id.* at 545-46, 105 S.Ct. 1487.

During his eight-day hearing before the PFC, Greer was represented by counsel and had the opportunity to hear the charges against him, present evidence in his defense and confront witnesses testifying against him. His hearing satisfied the basic requirements of procedural due process under *Loudermill*, and requiring more before termination in this context "would intrude to an unwarranted extent on the government's interest in quickly removing an unsatisfactory employee." *Id.* at 546, 105 S.Ct. 1487. The fact that Greer did not have the opportunity to contest whether his previous disciplinary reprimands were justified does not detract from the adequacy of Greer's PFC hearing. Unlike the petitioners in *Kaczmarczyk v. INS*, 933 F.2d 588, 596 (7th Cir.1991), who lacked the opportunity to rebut officially noticed facts before the Board of Immigration Appeals, Greer had ample previous opportunity to rebut the factual findings underlying the past charges against him when those disciplinary actions were prosecuted. Greer concedes that he received due process in connection with those past offenses, and due process does not require that the Department permit Greer to re-argue the merits of his previous offenses each subsequent time that he is charged with violating Department rules. The employee is entitled only to notice and a legitimate opportunity to respond before an unbiased adjudicator. See *Schacht v. Wisconsin Dep't of Corrections*, 175 F.3d 497, 503 (7th Cir.1999).

In addition, Greer complains that the PFC excluded testimonial evidence which he claims would prove that his charges against Amesqua were true. Essentially, Greer insists that the PFC pretermination hearing was insufficient because he was barred from presenting all the evidence that he felt was relevant, as he might at a trial. However, as we have discussed, a pretermination hearing need not be a "full evidentiary hearing" to satisfy due process concerns. See *Loudermill*, 470 U.S. at 545, 105 S.Ct. 1487; *Staples v. City of Milwaukee*, 142 F.3d 383, 387 (7th Cir.1998). With respect to a First Amendment retaliation claim, the relevant inquiry is whether the employer had reasonable grounds to believe that the employee had violated its rules and that its interests as an employer outweighed the employee's free speech interests. *See Waters v. Churchill*, 511 U.S. 661, 676, 114 S.Ct. 1878, 128 L.Ed.2d 686 (1994). The PFC needed only to ascertain a reasonable basis for finding whether Greer had violated Department rules, and "[o]nly procedures outside the range of what a reasonable manager would use may be condemned as unreasonable." *Id.* at 678, 114 S.Ct. 1878. The PFC hearing was quite sufficient under this standard, and Greer enjoyed adequate opportunity to respond to the charges against him.

2. *Conflicts of Interest*

At his PFC hearing, Greer moved for the recusal of Commissioners Alan Seeger, Margaret MacMurray and Byron Bishop, citing alleged conflicts of interest from their participation in hiring Amesqua and consequent involvement in a discrimination suit filed against them by an unsuccessful applicant for Amesqua's position. Greer claimed that the named commissioners possessed "a clear personal, official, and potential financial interest" in upholding Amesqua's decision to terminate Greer. A showing that administrative adjudicators were biased would establish a failing of procedural due process, but mere participation in earlier decisions that relate only

tangentially to the current adjudication does not constitute an impermissible conflict of interest, unless the employee can produce evidence that bias in fact infected resolution of his case. *See Hortonville Joint Sch. Dist. No. 1 v. Hortonville Educ. Ass'n*, 426 U.S. 482, 493, 96 S.Ct. 2308, 49 L.Ed.2d 1 (1976). Greer must overcome a strong presumption of "honesty and integrity" in assessing whether the adjudicators were impartial. *See Withrow v. Larkin*, 421 U.S. 35, 47, 95 S.Ct. 1456, 43 L.Ed.2d 712 (1975); *Vukadinovich v. Board of Sch. Trustees of Mich. City Area Schs.*, 978 F.2d 403, 411-12 (7th Cir.1992).

Greer failed to adduce any evidence of personal bias or animosity against him on the part of Seeger, MacMurray or Bishop, and it is difficult even to identify the conflict of interest that Greer suspects here. Greer's case had no bearing on the discrimination suit brought against the Department and the commissioners because that suit did not involve Greer in any way or touch upon any of the same underlying factual circumstances. Greer guesses that adjudging against him would permit the commissioners to present a united front with Amesqua and would therefore bolster their credibility in the discrimination suit. We are not sure why Greer thinks this to be the case, but without any substantiating evidence of bias, this confused possibility does not constitute an impermissible conflict of interest.

3. *Void for Vagueness*

Greer also argues that the Department rules under which he was terminated violated his due process rights because they were void for vagueness and failed to give him adequate prior

notice of workplace rules.[2] Although a government regulation is void for vagueness if people of common intelligence must necessarily guess at its meaning and differ as to its application, *see Grayned v. City of Rockford*, 408 U.S. 104, 108- 09, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972), the government acting in the role of employer enjoys much more latitude in crafting reasonable work regulations for its employees. For example, a government employer "may, consistently with the First Amendment, prohibit its employees from being 'rude to customers,' a standard almost certainly too vague when applied to the public at large." *Waters*, 511 U.S. at 673, 114 S.Ct. 1878; *see also Arnett v. Kennedy*, 416 U.S. 134, 158-62, 94 S.Ct. 1633, 40 L.Ed.2d 15 (1974). The Department need not have adopted "a quasi-criminal code" in establishing employment regulations. *See Keen v. Penson*, 970 F.2d 252, 259 (7th Cir.1992); *see also Brown v. City of Trenton*, 867 F.2d 318, 325 (6th Cir. 1989). Department rules gave fair warning to employees in instructing them to "conduct themselves so as not to bring the Department into disrepute" (Rule 51); "treat their superiors with respect [and] conform to the rules and regulations of the Department" (Rule 18); "conform to and promptly and cheerfully obey all laws, ordinances, rules, regulations, and orders" (Rule 39); "not [to] harass co-employees because of their sexual orientation" (Rule 65); and not to "engage in harassment on the basis of race, sex, religion, color, age, disability, national origin or sexual orientation." (APM 3-5). Although written in general language, these rules in the employment setting sufficiently define a range of

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[2] Greer also argued on appeal that the rules were unconstitutionally overbroad, but that claim is waived because he failed to raise that claim before the district court. *See United States v. Payne*, 102 F.3d 289, 293 (7th Cir.1996).

inappropriate conduct which a reasonable employee would understand to satisfy due process and convey adequate warning that Greer's news release would result in discipline.

Greer points to purportedly uneven punishment under Department rules as sapping them of fair notice of prohibited conduct. Even ignoring the fact that most of the cited instances of unpunished insubordination occurred under the previous Chief Earle Roberts, none of the other Department critics made comparably instigative accusations or possessed comparably poor disciplinary records. Greer's strongest example illustrates this point: The *Capital Times* reported in 1992 that firefighter Art Cuccia called Chief Roberts a "spineless, gutless, self-centered S.O.B." The Department punished Cuccia with a letter of discipline but added no further penalties. When asked about the disparity between the punishments received by Cuccia and Greer, Amesqua answered that Cuccia had a spotless disciplinary record before the incident and evinced genuine contrition by affirming his "utmost respect" for Roberts and explaining that his comment was a misquotation of a response to a journalist's question. In contrast, Greer had widely distributed an inflammatory news release criticizing the Department, possessed an opprobrious disciplinary record and had been disciplined under Department rules many times before. Amesqua had cautioned him that future misconduct would lead to a more serious penalty, and the PFC had specifically warned him that it "will not suspend him again." Blame for any failure to foresee severe punishment for his news release fell on Greer alone.

B. *Equal Protection*

To state a *prima facie* claim under the Equal Protection Clause of the Fourteenth Amendment, a plaintiff must demonstrate that (1) he is otherwise similarly situated to members of the unprotected class; (2) he was treated differently

from members of the unprotected class; and (3) the defendant acted with discriminatory intent. *See Johnson v. City of Fort Wayne*, 91 F.3d 922, 944-45 (7th Cir.1996). Greer complains that the Department violated the Equal Protection Clause by treating him, as a male heterosexual, differently from female homosexual employees who likewise have criticized the Department--namely Holtz and Amesqua.

Where an employee has an "undisputed record of gross insubordination," as Greer does, the employee must show that another grossly insubordinate worker was treated better than him to defeat the presumption that his comparatively harsher punishment was attributable to his poor disciplinary history. *See O'Connor v. Chicago Transit Auth.*, 985 F.2d 1362, 1371 (7th Cir. 1993). Greer claims that Holtz and Amesqua publicly criticized the Department and were not terminated, but neither had comparably dismal disciplinary records nor made comparably vituperative attacks. According to Department records, Greer had the worst disciplinary record in recent memory, and his public diatribe was an incendiary attack on the Department defying repeated warnings and sanctions in the past. Greer has failed to show himself to be similarly situated with Amesqua, Holtz and other members of the unprotected class treated better than him.

Moreover, Greer presents no evidence of prejudice against him. Greer invites an inference of bias based on the disparate treatment given to his news release compared with Department criticism by Holtz, Amesqua and another female firefighter that went unpunished. Similarly in *Vukadinovich*, the plaintiff argued that his employer had violated the Equal Protection Clause because he was "singled out" from his co-workers and punished for his alcohol-related problems while his similarly situated co-workers were not. We refused to engage in a review of all the employer's personnel decisions absent some evidence

of "purposeful or invidious prejudice" by the employer. *See Vukadinovich*, 978 F.2d at 414. Greer fails to produce such evidence of prejudice underlying the allegedly disparate treatment that he received, and his equal protection claim likewise fails.

C. *First Amendment Retaliation*

Lastly, Greer claims that the Department violated his First Amendment rights under the balancing test of *Pickering v. Board of Education of Township High School District*, 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968), by terminating him based on his news release. While it is undisputed that the Department fired Greer because of his news release, the Department violated Greer's rights under the First Amendment only if Greer can establish that (1) his speech addressed a matter of public concern and (2) his First Amendment interest in that speech outweighed any injury that the speech might cause to the government's interest in promoting the efficiency of the public services it performs through its employees. *See Waters*, 511 U.S. at 668, 114 S.Ct. 1878; *Pickering*, 391 U.S. at 568, 88 S.Ct. 1731. The PFC ruled that Greer's speech addressed a matter of public concern but decided that the Department's interests as an employer outweighed Greer's First Amendment interests. Without deciding whether Greer's speech addressed a matter of public concern, the district court agreed that the Department's interests outweighed Greer's First Amendment interests and affirmed the PFC's decision to discharge Greer. We now address this question de novo. *See Wright v. Illinois Dep't of Children & Fam. Servs.*, 40 F.3d 1492, 1499-1500 (7th Cir.1994). Under *Pickering* balancing, we assess Greer's speech as the Department reasonably believed it to be, after adequate investigation, when making the decision to terminate Greer. *See Waters*, 511 U.S. at 676, 114 S.Ct. 1878.

As the PFC correctly ruled, Greer's speech regarded a matter of public concern. Looking to "the content, form, and context" of Greer's news release, *Connick v. Myers*, 461 U.S. 138, 147-48, 103 S.Ct. 1684, 75 L.Ed.2d 708 (1983), we agree that the news release primarily addressed the issue of favoritism within the Department and the lenient disciplinary action taken against Marcia Holtz. Whether public officials are operating the government ethically and legally is a quintessential issue of public concern. *See Lickiss v. Drexler*, 141 F.3d 1220, 1222 (7th Cir.1998); *Knapp v. Whitaker*, 757 F.2d 827, 840 (7th Cir.1985); *see also Walter v. Morton*, 33 F.3d 1240, 1243 (10th Cir.1994). Although Greer's news release was replete with personal jibes at Amesqua and Greer nursed an ongoing disrespect for Amesqua, "[a] personal aspect contained within the motive of the speaker does not necessarily remove the speech from the scope of public concern." *See Marshall v. Porter County Plan Comm'n*, 32 F.3d 1215, 1219 (7th Cir. 1994). Greer's central motivation was exposing what he considered wrongdoing by declaring that the Department's handling of the Holtz-Cato incident reflected illegitimate favoritism by Amesqua for lesbian firefighters. His criticisms of the Department went far beyond complaints regarding his individual employment situation and were not motivated primarily by purely personal grievances. *See, e.g., Kokkinis v. Ivkovich*, 185 F.3d 840, 844 (7th Cir.1999); *Smith v. Fruin*, 28 F.3d 646, 653 (7th Cir.1994); *Swank v. Smart*, 898 F.2d 1247, 1251 (7th Cir.1990).

However, the second prong of the *Pickering* test instructs that we also must balance "the interest of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *See Pickering*, 391 U.S. at 567-68, 88 S.Ct. 1731. Factors to consider in applying *Pickering* balancing include (1)

whether the speech would create problems in maintaining discipline or harmony among co- workers; (2) whether the employment relationship is one in which personal loyalty and confidence are necessary; (3) whether the speech impeded the employee's ability to perform her responsibilities; (4) the time, place and manner of the speech; (5) the context in which the underlying dispute arose; (6) whether the matter was one on which debate was vital to informed decisionmaking; and (7) whether the speaker should be regarded as a member of the general public. *See Kokkinis*, 185 F.3d at 845; *Wright*, 40 F.3d at 1502.

Although it is often proper for public employees to raise questions about favoritism or improper investigation of disciplinary incidents, the manner and means of the employee's protestation are key considerations in balancing the employer's and employee's interests under *Pickering*. *See Wright*, 40 F.3d at 1503; *Hulbert v. Wilhelm*, 120 F.3d 648, 654 (7th Cir.1997); *Patkus v. Sangamon-Cass Consortium*, 769 F.2d 1251, 1259 (7th Cir.1985). Greer never approached Amesqua or Holtz regarding the Holtz-Cato incident, and did not pursue internal avenues for questioning the Department's investigation. Instead, unwilling to let the firefighters' union address the matter and ignorant of specifics about Spohn's investigation, Greer fired off his news release to local media, causing considerable public embarrassment to the Department. Without inside knowledge about the Holtz-Cato incident or the ensuing investigation, Greer speculated that Amesqua and Spohn "glossed over" workplace violence because Amesqua was illegitimately biased in favor of homosexuals. The publicity and sensationalism of Greer's news release belied the fact that it imparted little new information about the Holtz-Cato incident to the public discourse other than Greer's unsubstantiated suspicions. Greer's posture under *Pickering* would be stronger if he "had followed authorized procedures, appealed to more appropriate

authorities, or perhaps shown a wilful lack of investigation on the part of [his] superiors." *Wright*, 40 F.3d at 1504; *see also Hulbert*, 120 F.3d at 654. Despite his claim that he was innocently "just asking questions," Greer instead circulated his naked accusations to mass media outlets for broad public consumption and intended to indict the integrity of the Department's leadership publicly.

Moreover, the Department's interests in disciplining Greer and maintaining order were quite substantial. In a fax distributed to the major newspapers in Madison, Greer had publicly excoriated Amesqua as a lesbian harboring "radical agendas" and announced both Amesqua and Holtz to be "homosexual women" despite the fact that neither had publicly declared their sexual orientation (Greer protests irrelevantly that both had not concealed their homosexuality at work). His harangue led directly to the publication of a front-page newspaper story headlined, "Greer says fire chief plays gay games." Furthermore, Greer had a well-established history of publicly criticizing the Department over policy disagreements. Greer had just been suspended three months for distributing anti-homosexuality literature at work, and the PFC had warned him to cease his campaign against Amesqua. As a firefighter known within the community as an outspoken Department critic, Greer likely anticipated and intended the damaging effect of his news release. The Department reasonably felt that Greer's speech, if left unpunished, particularly in light of his disciplinary history, would disrupt the operation of the Department by degrading the Department's standing with the public, undermining Amesqua's authority and inciting disharmony within Department ranks. *See Campbell v. Towse*, 99 F.3d 820, 830 (7th Cir. 1996); *Marshall*, 32 F.3d at 1221; *Brown*, 867 F.2d at 322. As Amesqua declared in her charge letter, Greer's news release was "the equivalent to spitting in the Department's face." Analyzing analogous factual circumstances

in *Kokkinis*, we held that *Pickering* balancing favored the government when a police officer with a poor disciplinary record leveled sensationalistic charges of impropriety at the police chief during a television news interview. *Kokkinis*, 185 F.3d at 846. Likewise, the Department's interests as an employer in government efficiency and workplace morale outweigh Greer's First Amendment interests here.

Although Greer protests that his news release did not ignite actual disruption in his workplace, an employer need not establish actual disruption before disciplining an employee when the threat of future disruption is obvious. *See Waters*, 511 U.S. at 673, 114 S.Ct. 1878. After learning of Greer's news release, Amesqua promptly disciplined Greer to reestablish her authority and stave off workplace dissension potentially flowing from Greer's conduct. Greer's news release threatened to undercut Amesqua's authority and disrupt the Department, just as the police officer's accusations in *Kokkinis* potentially "undermined the Chief's ability to maintain authority and discipline within the police department." *Kokkinis*, 185 F.3d at 846 (quoting *Khuans v. School Dist.* 110, 123 F.3d 1010, 1017 (7th Cir. 1997)). A government employer need not "allow events to unfold to the extent that the disruption of the office and the destruction of working relationships is manifest before taking action," *Connick*, 461 U.S. at 152, 103 S.Ct. 1684, and we grant "substantial weight to government employers' reasonable predictions of disruption." *Waters*, 511 U.S. at 673, 114 S.Ct. 1878; *see also Weicherding*, 160 F.3d at 1143 (explaining that the defendant "need not wait until a riot breaks out before acting to quell a dangerous situation"); *Breuer v. Hart*, 909 F.2d 1035, 1040 (7th Cir.1990) ("The public employer is not required to wait until those working relationships actually disintegrate if immediate action might prevent such disintegration."). The potential disruption that Greer's news release could have caused to the Department's

operations if Greer had not been terminated is clear.

Greer expostulates at length that the "veracity" and "sincerity" of his statements bear critical weight, but truth is not an absolute defense under *Pickering* balancing. Indeed, the Department dropped its charges under Rules 47 and 50 because Saxe concluded that Greer believed the truth of his charges and did not violate the rules requiring honesty and prohibiting false reporting; the PFC instead found that Greer had violated Department rules against insubordination, harassment and bringing the Department into disrepute. Nonetheless, Greer claims his allegation that Amesqua had illegally favored Holtz was true, or at worst a sincerely held belief, and thus carried decisive weight under *Pickering*.

Recklessly false statements by a public employee enjoy no First Amendment protection, see *Brenner v. Brown*, 36 F.3d 18, 20 (7th Cir.1994), and from this principle Greer wrongly extrapolates that speech which is factually true therefore must be absolutely protected. However, we have never held that an employer must prove the falsehood of the employee's statement before disciplining the employee based on that speech. In fact, *Pickering* would be senseless if speech sincerely believed to be true was absolutely protected. *Pickering* balancing only applies to speech that is true or believed to be true, because recklessly false speech is unprotected by the First Amendment. In *Wright*, which Greer cites for support, we noted that a public employee "summoned to give sworn testimony ... has a compelling interest in testifying *truthfully* and the government employer can have an offsetting interest in preventing her from doing so only in the rarest of cases." *Wright*, 40 F.3d at 1505. The point is that an employee has an enhanced interest in telling the truth when sworn to do so before "an official government adjudicatory or fact-finding body," and his employer's interest is unlikely to counterprevail. *Id.* Greer's news release did not

constitute adjudicatory testimony under penalty of perjury and enjoys no special protection under *Wright*. Like the PFC, we have assumed that Greer's news release was not recklessly false and nonetheless hold that the Department was justified in terminating him under *Pickering*.

III. CONCLUSION

For the foregoing reasons, we AFFIRM summary judgment for the defendants on all Greer's claims.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

RONNIE B. GREER,

Plaintiff,

v.

DEBRA H. AMESQUA, Individually and in her capacity as Fire Chief of the City of Madison, Wisconsin, ALAN SEEGER, (In his individual and official capacities),MARGARET MACMURRAY (In her individual and official capacities), BYRON BISHOP (In his individual and official capacities), LYNN HOBBIE (In her individual and official capacities), MARIO MENDOZA (In his individual and official capacities), THE CITY OF MADISON FIRE DEPARTMENT, THE CITY OF MADISON, THE CITY OF MADISON POLICE & FIRE COMMISSION, and WISCONSIN MUNICIPAL MUTUAL INSURANCE COMPANY,

Defendants.

OPINION AND ORDER

Case No.: 98-C-0560-C

In this civil action brought pursuant to 42 U.S.C. § 1983, plaintiff Ronnie B. Greer contends that defendants Debra H. Amesqua, the city of Madison Fire Department, the City of Madison and the City of Madison Police and Fire Commission (and its constituent members defendants Seeger, MacMurray, Bishop, Hobbie and Mendoza) violated his right to freedom of speech by the First amendment and his rights to due process and equal protection of law protected by the Fourteenth Amendment.Defendants deny that they violated plaintiff's rights and assert that if the court finds otherwise they are entitled to qualified immunity.Previously plaintiff moved for a preliminary injunction on his first Amendment claim, but the motion was denied for lack of probability of success on the merits.*See Greer v. Amesqua*, 22 F. Supp. 2d 916 (W.D. Wis. 1998).

Presently before the court are plaintiff's and defendants' cross-motions for summary judgment.Because I conclude that defendants did not violate plaintiff's right to freedom of speech, did not deny him equal protection of law and provided him all the process due him under the Fourteenth Amendment, I will grant defendants' motion for summary judgment and deny plaintiff's motion for summary judgment. In light of this conclusion, it is unnecessary to address defendants' claim of qualified immunity. *See estate of Stevens v. City of Green Bay*, 105 F.3d 1169, 1178 (7th Cir. 1997).

Before reciting the undisputed material facts, it is necessary to address plaintiff's contention that the entire evidentiary record must be limited solely to the actions of defendant commission and the record before the commission. As discussed in greater detail below and in accordance with plaintiff's position, I will limit analysis of plaintiff's First Amendment claim to the facts as reasonably found by the commission at the time it made its decision. The analysis of his

due process claim is necessarily limited to the record before the commission; whether plaintiff's due process rights were violated depends entirely on whether the actual process he received was the process due him. It is unnecessary to rely on any facts other than those before defendant commission to decide plaintiff's equal protection claim.

However, as explained in my earlier decision denying plaintiff's motion for a preliminary injunction, the posture of this case in this court is very different from what it would have been in state court pursuant to the procedural review scheme available to plaintiff under Wis. Stat. §62.13(5) (1). This court's role is not simply to review matters decided by defendant commission to determine whether, in its role as employer, the commission violated any federal constitutional rights of plaintiff. As explained to both parties in the pretrial conference order, both parties were free to submt proposed findings of fact supported by appropriate citations to the record and to cite those facts in support of arguments for summary judgment. Indeed, both parties submitted to the court a joint pretrial report requesting extensive discovery, including depositions and interrogatories. Therefore, there is no merit to plaintiff's argument that *all* of defendants' proposed findings of fact that refer to depositions and affidavits taken after defendant commission's decision must be excluded in their entirety. For example, such innocuous proposed facts as "Greer prepared and circulated his news release in April 1997" and "Chief Amesqua assigned Assistant Chief Spohn to investigate this matter" are not only relevant and necessary background facts but were clearly known by defendant commission at the time of its decision. Such facts are included below.

From the facts proposed by the parties, I find the following to be material and undisputed.

UNDISPUTED FACTS

Defendant City of Madison is a Wisconsin municipal corporation. Defendant City of Madison Fire Department is a fire department organized under Wisconsin law. Defendant City of Madison Police and Fire Commission is a city commission organized under Wisconsin law. Defendant Debra H. Amesqua is Fire Chief for defendant City of Madison. Defendants Alan Seeger, Margaret MacMurray, Byron Bishop, Lynn Hobbie, and Mario Mendoza are members of defendant City of Madison Police and Fire Commission. Defendant Wisconsin Municipal Mutual Insurance Company provide insurance coverage to defendant City of Madison. Plaintiff Ronnie B. Greer was employed as a firefighter with the City of Madison Fire Department from February 4, 1981, until July 31, 1998, when he was terminated by order of defendant police and fire commission.

Plaintiff was disciplined in the mid-1980's for violation of a work rule prohibiting disrespect of superior officers. He was disciplined a second time in the 1980's for disrespect of a superior officer or insubordination. Plaintiff received a disciplinary suspension of ninety-six hours for disrespect because of an argument with a superior officer in 1995 or 1996. Plaintiff appealed that discipline to defendant commission, which upheld the decision. Plaintiff stipulated to the charges, not understanding that he could not challenge the stipulation on appeal. Plaintiff was next disciplined on June 25, 1997, for distributing anti-homosexual written material to firefighters in 1995-1996. Defendant commission found that plaintiff's conduct violated the City of Madison's employee rule prohibiting harassment and department rules 18, 51 and 65 (all described below). In its decision, defendant commission stated that it was "not overly confident that this discipline will

accomplish a change in respondent's pattern of conduct. However, we are confident that this Board will not suspend him again." This disciplinary decision is on appeal in state court.

In January 1996, defendant Amesqua was hired as the new chief of the department. Following her hiring, she was named along with defendant commission and defendants Seeger, MacMurray and Bishop as defendants in a lawsuit brought by one of the applicants alleging that defendant Amesqua had been hired because of her gender and race. Shortly after Amesqua was appointed, she promoted Marcia Holtz from lieutenant to Division Chief in Charge of Training. On October 3, 1996, a local television station doing a story about the training of Madison firefighters filmed and broadcast a live fire training session. In the report, Holtz is seen to make physical contact with a recruit named Ron Cato and yell at him.

Although the propriety of Holtz's conduct towards Cato was not a topic of the television report, Holtz's behavior was questioned by members of the department who happened to watch it. In a letter dated November 11, 1996, the president of the local firefighters union, Lt. Joseph P. Conway, asked Amesquo to order an independent investigation by the City of Madison attorney because he believed that Holtz's conduct had violated several department rules. Also, Conway advised Amesqua that he had spoken to other recruits and that his conversations led him to believe that Holtz had treated other recruits in the same way she had treated Cato. Conway urged that Holtz be suspended during the investigation.

Amesqua released her findings on the Holtz investigation in an internal memorandum dated April 9, 1997, in which she says that Holtz had reported that she was uncomfortable with her treatment of Cato because she had never taken such extraordinary measures. From this statement and other fact,

Amesqua found that Holtz's actions were "not unreasonable under the totality of the circumstances," but she extended Holtz's probation by six months and ordered her to participate in a leadership class.

On April 28, 1997, plaintiff issued to at least two local newspapers a document he called a "news release" that reads in full as follows:

News Release
Homosexual Chief rewards Homosexual Chief for Assault?

> Fire Chief Debra Amesqua issued a decision on the investigation of an incident involving Training Chief Marcia Holtz and a fired firefighter trainee. In the incident, recorded by WMTV News-15 in October 1996, Chief Holtz shoved and screamed at the trainee during a training exercise. An investigation was ordered and a decision based on the investigation was issued on April 9, 1997. It is Chief Amesqua's conclusion that the "questionable measures" (shoving & screaming) used by chief Holtz were not "unreasonable", and that she simply "needs further guidance and training". That training is to be accomplished by "attending an advance leadership class", a training program which is coveted by other chief officers to the extent that there is a "waiting list" to get in! She has also called for a 6 month extension of chief Holtz's probationary period, something she (Chief Holtz) herself appears to have suggested.
>
> Now this would be laughable [if] it were not such a serious matter. A senior office in essence, physically and verbally assaults an employee and Chief Amesqua finds that "not unreasonable" and that her screaming was "professional in content and germane". In over 17 years

of firefighting with both experienced and non-experience[d] firefighters, I don't believe I've ever seen a situation where it was necessary to physically assault anyone to get their attention or to instruct them. Granted it is often necessary to make physical contact in a fire situation to initiate communication with another firefighter, but never to the extent as we have seen in this incident. So what's so special or different about this case?

I said in October that this matter would be "down played", "swept over" and nothing significant would be done about it. A lot of my fellow firefighters doubted my "prediction". Well, time has "told the story". One does not need to be a prophet, just someone willing to see things as they are.

Consider the following. One would think that if you wanted to achieve clear facts in investigating a matter of this type it would be only proper to have that investigation done by an independent, disinterested party. However, that is not the case here. The investigation was done by another Division Chief who is subordinate to Chief Amesqua and a staff member with Division Chief Holtz. Is it possible that the investigating officer could have bee unduly influenced? Or could the conclusions of the investigation be simply disregarded without opposition by that subordinate?

The relationship between Chief Amesqua and Chief Holtz goes back a ways, namely through their affiliation with an organization called "Women In Fire [Service]", an organization seen by most firefighters in this area as a predominately homosexual organization. Is it possible that some favoritism has been shown here to a fellow

member or possible friend?

Both are homosexual women, who have been seen in the past (and still now among many), with clear agendas as it is concerns women in the fire service. Could it be that their radical agendas has come to play to the extent that even violence can be excused as "glossed over", or in this case, rewarded? Sounds a lot like the much assailed "good-ol-boy" system revived, repainted and given another name.

Now, I'm confused and maybe someone could make sense of this for me; It's not okay to communicate verbally my views on a department chief officer's handling an issue but it's okay to use physical force to communicate with a trainee? Maybe I'm missing something! The department/city is willing to spend thousands of dollars on a case of an alleged comment without proof, on alleged harassment without a complaint or proof, and on an alleged rule violation without action or proof, but "winks" at and rewards physical assault?

Another firefighter is given a disciplinary letter and has the same placed in his employment file because he made a remark regarding homosexuals. He was "off-duty" and happened to stop by the fire station. A letter of discipline?

A fire officer is facing a 12 hour suspension for angrily making comments to a uniform delivery driver whom he is familiar with. A 12 hour suspension?

But yet, it's not unreasonable for a chief officer in anger to physically handle an employee? Imagine if it were a

white male chief officer showing and screaming at a female recruit. Heads would have rolled! So much for fair treatment and equity! Go figure.

Oh, by the way, that male trainee who was the victim, he was mysteriously "let-go" literally days before graduating from the fire academy. Makes you go, "Hmm."

/s/ Just sharing my thoughts with you all.

Portions of plaintiff's news release were quoted in a May 1, 1997, article in a Madison newspaper, the *Capital Times,* which states, in part:

Greer says fire chief plays gay games
Raps treatment of woman in shoving incident

* * *

Madison firefighter Ron Greer has lobbed another Molotov cocktail at his boss, this time accusing Fire Chief Debra Amesqua of meting out lax discipline to a female assistant fire chief.

He also insinuates that it's a lesbian conspiracy.

In a press release title "Homosexual chief rewards homosexual chief for assault?" Greer implies that Amesqua showed favoritism in an investigation of Assistant Chief Marcia Holtz.

Holtz was accused of using excessive force on a recruit during a live fire training exercise last October.

Neither Amesqua nor Holtz has said anything publicly about their sexual orientations, whether they're gay or

straight.

The discipline for Holtz, recently made public, is a six-month extension of Holtz's probation and a requirement that she attend an advanced leadership class. Greer criticizes the sanction, saying that getting to attend a leadership class is a highly sought-after perk, not a penalty.

* * *

Greer, a pastor of a conservative Christian church, has become an anti-gay crusader. He has attacked the chief publicly ever since she came to Madison in January 1996.

Saying Amesqua was unqualified, Greer carried a protest sign when she was sworn in.

Greer himself is facing discipline for insubordination and for handing out anti-gay literature at work. The Madison Police and Fire Commission held roughly 20 hours of hearings on Greer's case and is expected to rule in a few months.

Holtz provided the spark for the latest Greer-Amesqua flap.

* * *

Following plaintiff's issuance of the news release, Amesqua initiated an investigation to determine whether plaintiff had violated department rules. She directed Assistant Chief Carl Saxe to conduct a pretermination hearing. Attendance at the hearing was mandatory and plaintiff could not call witnesses, ask his own questions, review witness statements or cross examine witnesses. Plaintiff was asked a series of questions

designed to elicit the circumstances surrounding his issuance of the news release. After the hearing, Saxe reported to Amesqua that in his view plaintiff had violated various department rules.

In a letter dated June 10, 1997, Amesqua informed plaintiff that she believed he had committed rule violations that included disseminating a communication with the intent to discredit supervisors and the department and violating the department's rule against harassment of employees on the basis of sexual orientation. Amesqua asked for plaintiff's resignation and told him that if he did not resign, she would seek his termination before defendant commission.

Plaintiff did not resign and Amesqua filed charges seeking plaintiff's termination with defendant police and fire commission. Plaintiff was suspended with full pay pending results of the hearing. The hearings before the commission took place over seven months on eight separate days for a total of more than twenty-two hours. Plaintiff was represented by counsel and permitted to present testimony and documentary evidence and to cross examine witnesses who testified against him.

The commission concluded that plaintiff's discharge was warranted under five different departmental and city rules: 1) fire department Rule 51, which provides that "officers and members shall at all times conduct themselves so as not to bring the department into disrepute"; 2) rule 18, which provides that employees must "treat their superiors with respect," "conform to all rules and regulations of the department," and render service with "discretion and fidelity"; 3) Rule 39, which provides that employees must "conform to and promptly and cheerfully obey" all "rules, regulations and orders" that emanate "from due authority"; 4) Rule 65, which provides that employees "shall not harass co-employees because of their

sexual orientation" by use of "derogatory verbal or written comments" or "conduct which would interfere with the performance of their duties"; and 5) Madison Administrative Procedure Memorandum 3-5, which prohibits harassment in the workplace on the basis of sexual orientation and other protected characteristics under state and federal law. Defendant Fire Department dropped its charges against plaintiff under rules 47 and 50, which require employees to "speak the truth at all times" and prohibit "false reports."

After finding that plaintiff's speech warranted discharge under departmental and city rules, defendant commission considered whether plaintiff's speech was protected by the First Amendment. To make this determination, defendant applied the *Connick-Pickering* test, which can be summarized as giving First Amendment protection to public employee speech that is a matter of public concern provided that the employee's interest in expressing a view on a subject outweighs the harm to a public employer that can result when an employee speaks his or her mind. *See Connick v. Myers*, to warrant application of the test articulated in *Pickering* for balancing the interests of the employee and employer as to each of the rule violations with which plaintiff was charged. In each case, defendant commission determined that plaintiff's interest in expressing his views was outweighed by the interests of the department and the public in maintaining orderly administration of the department and a harassment-free work environment for all department employees.

In a decision dated July 31, 1998, the commission ordered that plaintiff be discharged. The decision was appealable directly to state court under Wis. Stat. §62.13(5)(I), but plaintiff chose to file the present action instead.

OPINION

Summary judgment is appropriate if there are no disputed issues of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Weicherding v. Riegel*, 160 F.3d 1139, 1142 (7th Cir. 1998). All evidence and inferences must be viewed in the light most favorable to the non-moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986). However, the non-moving party must set forth specific facts sufficient to raise a genuine issue for trial. *Celotex v. Catrett*, 477 U.S. 317, 324 (1986).

A. First Amendment

It is well established that government as employer has "a freer hand in regulating speech" than government as sovereign. *Wright v. Illinois Dept. of Children & Family Services*, 40 F.3d 1492, 1500 (7th Cir. 1994). The First Amendment "does not require a public office to be run as a roundtable for employee complaints over internal office affairs." *Connick*, 461 U.S. at 149. At the same time, public employees do not relinquish their First Amendment rights when they accept employment in the public sector. *See Biggs v. Dupo*, 892 F.2d 1298, 1303 (7th Cir. 1990) ("[F]reedom of speech is not traded for an officer's badge."). First Amendment claims asserted by public employees are evaluated utilizing a three-step inquiry: (1) was the employee's speech protected by the First Amendment; and (2) if so, was the employment decision motivated by the speech; and (3) if so, would the employer have taken the same action but for the speech. *See Mt. Healthy City School District Board of Educ. v. Doyle*, 429 U.S. 274, 284-87 (1977).

In this case, only the first step is at issue: evaluating whether plaintiff's speech is protected by the First Amendment. To determine whether a government employee's speech is

protected by the First Amendment, courts employ the same *Connick-Pickering* test the defendant commission applied. First, the court determines whether the employee's speech addresses a matter of public concern. *See id.* (citing *Connick*, 461 U.S. at 146). If it does, then the court balances the "interest of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.'" *Id.* (quoting *Pickering*, 391 U.S. at 568).

A threshold issue is the scope of the evidentiary record before the court in deciding plaintiff's First Amendment claim. Is it limited to just what was before the commission wehn it made its decision or does it include any properly submitted evidence relevant to the determination of the nature of plaintiff's speech under *Connick*? A related question was addressed in *Waters v. Churchill*, 511 U.S. 661 (1994), a case that clarified the extent of the employer's obligation to determine what the employee actually said before imposing discipline. *Waters* held that in conducting a *Connick* inquiry to determine whether particular speech is a matter of public concern, a court should look at the statements the employer *reasonably* believed the employee made. "Reasonably" means after the employer has conducted an investigation into what was actually said, using reasonable care. *See id.* at 677. In *Weicherding*, 160 F.3d at 1143, the Court of Appeals for the Seventh Circuit extended the *Waters* rule to cover not only what the employee said, but all facts reasonably found by the employer at the time the employee was terminated.

From the *Waters* and *Weicherding*, it was the defendant employers who wanted the record limited to what was before them at the time of discharge. In this case, it is plaintiff who insists that the record be so limited. In particular, plaintiff

wants to exclude evidence gathered from his own deposition taken during discovery in this litigation and an affidavit from defendant Amesqua, because defendants have attempted to use that evidence to establish that plaintiff's motive in issuing the news release was furtherance of his personal belief that homosexuality is a sin and homosexuals should not hold public office.

In a closely related argument, plaintiff urges the court not to re-open the defendant commission's decision that his news release met the public concern requirement of the *Connick* analysis. He argues that because the commission found that his speech touched upon matters of public concern, its decision to fire him could not be based on the ground that his speech was wholly personal in nature and therefore unprotected. He contends that defendants cannot try to justify his termination on the ground that his speech represented his personal beliefs and gripes. *See Miller v. Whitburn*, 10 R.3d 1315 (7th Cir. 1993) (administrative agency may not raise justification for its action that it failed to rely upon during administrative proceedings).

Plaintiff is correct that under *Waters* and *Weicherding*, a court engaged in a First Amendment analysis of public employee speech should look at all facts as reasonably found by the employer at the time the employee was terminated. He is less persuasive in asserting that the court must accept defendant commission's decision that his speech touched upon matters of public concern under *Connick*. However, in this case, even if the record is limited to those facts before the commission at the time it made its decision and even if I accept defendant commission's decision that plaintiff's speech was public in nature, the outcome is not affected. Accordingly, I will limit the First Amendment analysis to the *Pickering* side of the equation: balancing plaintiff's interest in commenting upon matters of public concern and the interest of defendants in promoting the

safe and efficient operation of its services, using the facts as the commission found them at the time of its decision. I find that even if, as plaintiff insists, I exclude evidence not before the commission at the time of its decision and accept the commission's decision that plaintiff's speech addressed matters of public concern, his speech is still not entitled to First Amendment protection under the *Pickering* balancing test.

Among factors considered in performing the *Pickering* balancing test are the effect of the employee's speech on the orderly operation and efficiency of services; the effect of the speech on the employee's ability to perform his or her duties; the nature of the employee's duties, including whether his position is one of loyalty or confidence; and the time, place, and matter of the employee's speech or activity. *See Weicherding*, 160 F3d at 1142. Contrary to plaintiff's assertions, the truth or falsity of the employee's speech is not necessarily a critical factor in public employee free speech cases generally and it is irrelevant in this case. *See Connick*, 461 U.S. 138 (1983) (truth or falsity of employee speech not addressed); *Waters*, 511 U.S. 661 (1994) (truth or falsity of employee speech not addressed); *Campbell v. Towse*, 99 F3d 820 (7th Cir. 1996) (truth or falsity of employee speech not addressed); *Probst v. Bitzer*, 39 F.3d 148 (7th Cir. 1994) (truth or falsity of employee speech not addressed). Plaintiff's reliance on *Wright v. Illinois Dept. of Children & Family Services*, 40 F.3d 1492, 1505 (7th Cir. 1994), is misplaced. In *Wright*, the court of appeals considered whether "an employee who testifies before an official government adjudicatory or fact-finding body speaks in a context that is inherently of public concern." The court refused to find that employee speech is protected simply because it is made in the course of a lawsuit or otherwise under oath:

...[T]here is no sound basis for granting greater

> constitutional protection to statements made under the Petition Clause than to other run-of-the-mill speech or expression. In short, airing private gripes in the form of a complaint or testimony cannot alter their status as private gripes.

Id. Instead, the court held that in determining the weight to be accorded to the employee's interest when assessing the *Pickering* factors, court should be mindful that "an employee summoned to give sworn testimony has a compelling interest in testifying *truthfully* and the government employer can have an offsetting interest in preventing her from doing so only in the rarest of cases." *Id.* In other words, because an employee has a particularly strong interest in not perjuring him or herself, truthful testimony is usually but not automatically protected under the *Pickering* balancing test.

This does not imply, as plaintiff insists, that truthful statements in other fora, such as news releases, are entitled to substantial weight. Because it is difficult to imagine how false or erroneous employee speech could raise matters of public concern, it is arguable that truth is a necessary but insufficient condition for first amendment protection. Indeed, the court of appeals for the Seventh circuit has held that recklessly untrue speech is never protected; true speech might be, *if* it survives the *Connick-Pickering* analysis. *See Brenner v. Brown*, 36, R.3d 18 (7th cir. 1994). To hold, as plaintiff insists, that public employers must prove an employee's speech is recklessly untrue before imposing discipline would require extensive fact-finding investigations every time an employee alleged wrongdoing regardless how severely the speech disrupted the employer's interest in effective operation, a result clearly not contemplated under either *Connick* or *Pickering*.

Further, unlike the situation in *Wright*, plaintiff's discipline

was not conditioned on his employer's belief that he spoke untruthfully. Defendant commission explicitly stated: "We will not condition [plaintiff's] constitutional rights on our judgment of his accuracy." The commission then applied the *Connick-Pickering* test, finding that plaintiff's speech was recklessly untrue after they had said that they would not attempt to determine its truthfulness. If defendants had determined that plaintiff's speech was recklessly untrue, it would not have found that it touched upon matters of public concern and there would have been no need to apply the *Pickering* balancing test. Moreover, defendant Fire Department dropped its charges against plaintiff under Rule 47, which requires employees to "speak the truth at all times" and Rule 50, which prohibits "false reports."

Plaintiff points to language in defendants' decision that describes his news release as "uninformed and uninformative" to support his argument that defendants decided that his insinuations were untrue despite its statements to the contrary. However, even a cursory reading of the news release indicates that plaintiff was not purporting to state as a fact that the department investigation was a coverup. Rather, plaintiff raised questions regarding that possibility: "Is it possible that some favoritism has been shown here to a fellow member of possible friend?...Could it be that their radical agendas has come to play to the extent that even violence can be excused as 'glossed over', or in this case, rewarded?" Defendants need not have determined that plaintiff's insinuations were untrue to determine that they were "uninformed and uninformative." By their very nature, the questions plaintiff posed fit that characterization.

The weight accorded to the *Pickering* factors depends upon both the nature of the employee's work and the mission of the agency for which he or she works. *Egger v. Phillips*, 710 F.2d

292 (7th Cir. 1983). Courts have recognized repeatedly that when the mission of the agency is to protect public safety, governments have a particularly acute interest in orderly and effective performance of public services that is entitled to even more weight. *See Weicherding*, 160 F.3d 1139 (prison guard); *Shands v. City of Kennett*, 939 F.2d 1337 (8th Circ. 1993) (firefighter); *Versage v. Township of Clinton New Jersey*, 984 F.2d 1359 (3d Cir. 1993) (firefighter); *Bruer v. Hart*, 909 F.2d 1035 (7th Cir. 1990) (law enforcement); *Mings v. Department of Justice*, 813 F.2d 384 (Fed. Cir. 1987) (border patrol agent); *Egger* 710 F.2d 292 (law enforcement); *Bickel v. Burkhart*, 632 F.2d 1251 (5th Cir. 1980) (firefighter); *Jansuaitis v. Middlebury Volunteer Fire Dep't*, 607 F.2d 17 (2d Cir. 1979)(firefighter).

In *Weicherding*, 160 F.3d 1139, the court of appeals held that a prison guard's interest in promoting a Ku Klux Klan rally and advocating white power was substantially outweighed by his employer's interest in preventing disruption of safe and effective prison guard services. *See id.* at 1143. The court noted that the plaintiff's speech would disrupt operation of the prison by exacerbating racial tensions. *See id.* In addition, the court noted that the guard had attracted media attention and identified himself freely as an employee of the Illinois Department of Corrections. *See id.* Therefore, his discharge did not violate the First Amendment.

In *Campbell v. Towse*, 99 F.3d 820 (7the Cir. 1996), the plaintiff police officer was suspended for nine days after writing a letter to the chief of police questioning the chief's management style and several of the policies he had instituted. *See id.* at 823. The court of appeals observed that the police department had a heightened interest in assuring the loyalty of subordinates and that the chief's interest in maintaining department order and discipline outweighed the plaintiff's

interest in his speech. *See id.* at 829. Therefore plaintiff's speech was not protected by the First Amendment. *See id*

In *Shands*, 993 F.2d 1337 (8th Cir. 1993), the court of appeals upheld the dismissal of plaintiff firefighters who alleged they had been discharged in violation of the First Amendment. The firefighters had petitioned city council members not to hire a certain firefighter they believed was unqualified and had informed the council that the new fire chief had bought equipment they believed was unsafe. *See id.* at 1341. In applying the *Pickering* balancing test, the *Shands* court noted,

> As a public safety organization, a fire department, like a police department, has a more significant interest than the typical government employer in regulating the speech activities of its employees in order "to promote efficiency, foster loyalty and obedience to superior officers, maintain morale and instill public confidence" in its ability.

Id. at 1344. The court found that the chief must be afforded wide deference in his determination that the firefighters' speech would cause disruption and that such disruption could be fatal to the effective operation of the department. *See id.* at 1345. In addition, the court found that the new chief had a particularly strong interest in establishing his authority and in preventing its erosion. *See id.* Therefore, despite the importance of the firefighters' speech, the court found that the department's interest in preventing disruption of the safe and effective delivery of firefighting services outweighed the firefighters' interest in speaking out. *See id.* at 1346.

Sinilarly, the court observed in *Versage* that "when lives are at stake in a fire, an *espirit de corps* is essential to the success of the joint endeavor." *Id.* at 1367. It concluded that the

important interest of the fire department in preventing disruption outweighed the limited interests of the plaintiff firefighter and the public in plaintiff's speech. *See id.* at 1368. This sentiment is echoed in *Janusaitis*" "When lives may be at stake in a fire, carping criticism and abrasive conduct have no place in a small organization that depends upon common loyalty-'harmony among *co*workers.'" *Id.* at 26. Moreover, the government need not show actual disruption in the workplace before taking action to prevent it. *See Weicherding*, 160 F.3d at 1143; *Connick*, 461 U.S. at 152 (employer has no obligation "to allow events to unfold to the extent that the disruption of the office and the destruction of working relationships is manifest before taking action."). Thus, as a firefighter criticizing his superior officers, plaintiff faces an even greater burden than a typical government employee in establishing that his and the public's interest in disseminating his "news release" outweighs defendants' and the public's interest in suppressing it. He cannot overcome this burden.

It seems clear that plaintiff's bitter public criticism of three superior officers (Amesqua, Holtz, and the investigator, Spohn) could have a negative effect on firefighter unit cohesion, an essential factor in the safe and effective performance of duties. *See Campbell*, 99 F.3d at 830 (7th Cir. 1996) (noting that police officer's criticism of chief could disrupt "departmental discipline and cohesion"); *Janusaitis*, 607 F.2d at 26 (noting that firefighter's criticism could impair common loyalty upon which unit depends to act effectively when lives are at stake); *see also Shands*, 993 F.2d at 1345 ("[W]here the fire chief does not closely supervise those under his command, personal loyalty to the chief is critical to the management structure of the fire department."). The nature of a firefighter's duties depends upon loyalty and confidence; biting public criticism that calls loyalty and confidence into question may severely hamper both the orderly operation and efficiency of services and the

employee's ability to perform his or her duties.

Beyond simply criticizing superior officers, plaintiff's decision to state publicly that two of his superior officers are homosexuals interferes with intensely personal interests in a manner likely to cause lingering anger and resentment among those officers an other co-workers. A residue of personal animus among firefighters is incompatible with the safe and effective deliver of public services. *See Mings*, 813 f.2d at 389 (continued presence of employee who expressed hostile attitude toward Hispanic co-workers and supervisors likely to disrupt operation of agency).

In addition, the news release's derogatory tone toward homosexuals in general may cause fear among the public plaintiff was hired to serve that the safety of some of its members is more important to him than the safety of others. *See id.* (fear that border patrol agent hostile to Hispanics might show less respect for their rights). "The public knows that its protectors have a private agenda; everyone does. But it would like to think that they leave that agenda at home while they are on duty." *Rodriguez v. City of Chicago*, 156 R.3d 771, 779 (7th Cir. 1998) (Posner, C.J., concurring). In publicly insinuating that there was a "radical" homosexual conspiracy afoot among is superiors, plaintiff publicly mixed apparent personal biases with professional interest in a manner likely to cause the public to wonder whether he had left his private agenda at home while on duty. This does not imply that plaintiff actually displayed aversion toward homosexuals in the performance of his duties. Rather, it suggests that defendants could have had a legitimate fear that plaintiff's actions would undermine confidence in the department in a portion of the public it is intended to serve. There can be no doubt that the fire department has a significant interest in preventing employee speech that so undermines the department's mission.

Against defendants' particularly acute interests in preventing both disruption in a workplace where cohesion is especially paramount and the erosion of public confidence in a department designed to instill public confidence, plaintiff's interest in disseminating his news release is relatively insubstantial. The incident discussed in the news release was widely known before plaintiff's news release reached the newspapers. Plaintiff's news release added nothing to the public debate other than an insinuation that the investigation was a sham because of Amesqua's and Holtz's allegedly shared sexual orientation and "agenda." Compared to defendants' interests in maintaining firefighter cohesion and public confidence, plaintiff's interest in disseminating such speech is minimal at best. In short, the potentially disruptive effect of plaintiff's news release substantially outweighed plaintiff's private interest in disseminating it. Therefore, plaintiff's speech was not entitled to protection under the First Amendment. *See Weicherding*, 160 F.3d at 1144.

B. Due Process

The right to due process is absolute and does not depend upon the merits of plaintiff's First Amendment claim. *See Carey v. Piphus*, 435 U.S. 247, 266-67 (1977); *Babcock v. White*, 102 F.3d 267, 271 (1996). Therefore, plaintiff's due process claims must be addressed despite the conclusion that his speech was not protected by the First Amendment. Obviously, whether plaintiff's due process rights were violated depends entirely on whether the actual process plaintiff received was the process due him. Plaintiff alleges that he was denied both substantive and procedural due process in violation of the Fourteenth Amendment.

The due process clause of the Fourteenth Amendment has come to embody two related but distinct concepts: procedural

due process and substantive due process. Procedural due process guarantees persons a fair decisionmaking process before a state deprives them of life, liberty or property. Procedural due process is unconcerned with outcomes: as long as fair decisionmaking processes are offered, procedural due process is satisfied. By contrast, substantive due process is concerned with results. Rather than guaranteeing an individual the right to a fair decisionmaking procedure, substantive due process prevents the state from taking certain actions even if it does provide procedural safeguards.

1. Substantive due process

Plaintiff's allegation that he was denied substantive due process stems from defendant commission's allegedly arbitrary and capricious decision not to investigate the truth of plaintiff's allegations before disciplining him. However, plaintiff cannot raise a substantive due process claim if "a particular part of the constitution 'provides an explicit textual source of constitutional protection against a particular sort of government behavior.'" *Schacht v. Wisconsin Dep't of Corrections*, 1999 WL 2245667, *3 (7th Cir. 1999)(citations omitted). As in *Schacht*, plaintiff's substantive due process claim fits "squarely within our established procedural due process jurisprudence," because in essence it is a claim that he received an unfair hearing. *Id.* at *4. Therefore, plaintiff cannot raise a substantive due process claim on these grounds. *See id.* Moreover, to the extent that plaintiff is asserting he was denied a fundamental right by the commission's decision not investigate the truth of his allegations, that is simply a recycling of his previously addressed First Amendment claim.

2. Procedural due process

"Before one may be deprived of a constitutionally protected

property interest in one's public employment...due process requires that a pretermination hearing be held." *Cleveland Bd. Of Educ. v. Loudermill*, 470 U.S. 532 (1985). Though necessary, such hearings "need not be elaborate." *Id.* at 545. "In general, 'something less' than a full evidentiary hearing is sufficient prior to adverse administrative action." *Id.* (citing *Mathews v. Eldridge*, 424 U.S. 319, 343 (1976)). The pretermination hearing need not definitively resolve the propriety of the discharge; rather, it should be an initial check to insure there are reasonable grounds to believe the charges against the employee and that they support the proposed action. *See id.* at 545-46. "To require more than this prior to termination would intrude to an unwarranted extent on the government's interest in quickly removing an unsatisfactory employee." *Id.*

The parties agree that plaintiff had a protected property interest in his employment. The question is whether plaintiff received the process due him. Before his termination, plaintiff received an evidentiary hearing before the five-member police and fire commission that took place over seven months on eight separate days and lasted more than twenty-two hours. Plaintiff was represented by counsel. Plaintiff was permitted to present testamentary and documentary evidence and to cross examine witnesses who testified against him. Plaintiff was permitted to make an opening statement and to make a closing argument. Although plaintiff admits that he received "the basic formalities of procedural due process," he nonetheless asserts several reasons why he believes he did not receive the process he was due before his termination.

a. Unfair predetermination hearing

Prior to his termination hearings, plaintiff was given a pretermination hearing before assistant Chief Saxe. Attendance

at the hearing was mandatory and plaintiff could not call witnesses, ask his own question, review witness statements or cross examine witnesses. Plaintiff was asked a series of questions designed to elicit a description of the circumstances surrounding his issuance of the news release. From the information gathered at this hearing, Saxe reported to Amesqua that he believed plaintiff had violated departmental rules. However, plaintiff was not terminated as a result of the pretermination hearing. Rather, he was suspended with full pay pending his full hearing before the commission. Even if the pretermination hearing were unfair (and there is certainly not enough evidence to suggest that it was), it did not violate due process because plaintiff was not deprived of a property interest as the result of it. *See Loudermill*, 455 U.S. at 524 (due process requires "some kind of hearing" prior to *discharge* of employee who has constitutionally protected property interest in employment).

b. Biased decision makers

Plaintiff argues that three of the commissioners (defendants Seeger, MacMurray and Bishop) should have recused themselves from his hearing because they participated in the decision to hire Amesqua, resulting in a lawsuit against them alleging discrimination based on gender and sexual orientation. Because of this, plaintiff argues, defendants had a "personal, official, and potential financial interest in the issue of Amesqua's illegal activity" and therefore were too biased to provide him with a fair hearing. In addition, defendants participated in the earlier decision to discipline plaintiff for distributing anti-homosexual literature at a fire station and warned him then that they were not optimistic that his behavior would change but theat they were "confident that his Board will not suspend him again." Plaintiff asserts that this cryptic threat to fire him for further disruptions establishes that defendants

had predetermined his case. In addition, plaintiff had criticized defendants publicly before his hearing.

A fair and impartial decision maker is a requirement of procedural due process. *Withrow v. Larkin*, 421 U.S. 35, 46, (1975). This requirement is denied when an administrative decision maker performing a quasi-judicial function has a "personal or financial stake" in the outcome that creates an unacceptably high probability of bias. *Hortonville Joint Shc. Dist. No. 1 v. Hortonville Ed. Assoc.*, 426 U.S. 482, 491-92 (1975). However administrative adjudicators are entitled to a strong presumption of "honesty and integrity" that a plaintiff alleging unconstitutional bias must overcome. *Withrow*, 421 U.S. at 46.

In *Hortonville*, plaintiff school teachers went on strike when negotiations with the local school board failed and were fired by the school board following disciplinary hearings. The teachers sued, arguing that they were deprived of procedural due process because their adjudicators were also their adversaries in the very contest that led to the disciplinary hearings. The Supreme court rejected the teachers' argument, holding that "familiarity with the facts of the case gained by an agency in performance of its statutory role does not disqualify a decisionmaker." *Id.*at 497. Moreover, the court held that the fact that the board members had taken public positions on issues related to the dispute prior to the hearings did not disqualify them "in the absence of a showing that [the decision maker] is not capable of judging a particular controversy fairly on the basis of its own circumstances." *Id.* at 493; *see also Withrow*, 421 U.S. at 48-49; *Federal Trade com. V. Cement Institute*, 333 U.S. 683 (1948).

Like the school board members in *Hortonville*, defendants are entitled to a presumption of honesty and integrity despite

their involvement in Amesqua's hiring and plaintiff's prior discipline. Like the plaintiffs in *Hortonville*, plaintiff offers no factual evidence of bias. He does not explain how the outcome of his case could put defendants in personal, professional or financial risk because of the lawsuit they faced related to their decision to hire Amesqua. Obviously, whether plaintiff's news release was protected by the First Amendment had nothing to do with whether defendants decided to hire Amesqua years earlier in reliance on impermissible characteristics.

Similarly, plaintiff's allegation that defendants had prejudged his case is simply without evidence or merit. It is true that defendants had warned plaintiff he would be fired for his next serous disruption. Far from depriving him of due process, that warning actual placed plaintiff on heightened notice. Moreover, the length and elaborateness of the proceedings that led to his dismissal indicates that defendants had not prejudged plaintiff's case. Indeed, the record indicates that defendants considered carefully whether plaintiff's speech was protected by the First Amendment before taking action against him despite their earlier warning that plaintiff would not be suspended again. With absolutely no evidence of unconstitutional bias in fact and strong evidence of a careful and deliberative process, plaintiff cannot overcome the heavy presumption of honesty and integrity to which defendant administrative decisonmakers are entitled.

c. Lack of notice because of vagueness of rules and selective enforcement

Plaintiff argues that given the vagueness of the rules he was found to have violated he had no notice that his news release would violate them. It is true that due process is violated if a rule is so vague that persons "of common intelligence must necessarily guess at its meaning and differ as to its application"

and therefore fails to provide notice of what is prohibited. *Connally v. General Const. Co.*, 269 U.S. 385, 391 (1926); *see also Grayned v. City of Rockford*, 408 U. S. 104, 108 (1972). However, plaintiff fails entirely to address or explain how the individual rules he was found to have violated are so vague that their meaning must be guessed at by persons of common intelligence. He cites no decisions construing similar rules. "Arguments that are not developed in any meaningful way are waived." *Central State, Southeast and Southwest Areas Pension Fund v. Midwest Motor Express, Inc.*, 1999 WL 361671, *7 (7th Cir. 1999); *see also Finance Investment Co. (Bermuda) Ltd. v. Geberit AG*, 165 F.3d 526, 528 (7th Cir. 1998); *Colburn v. Trustees of Indiana University*, 973 F.2d 581, 593 (7th Cir. 1992) ("[plaintiffs] cannot leave it to this court to scour the record in search of factual or legal support for this claim); *Freeman United Coal Mining Co. v. Office of Workers' Compensation Programs, Benefits Review Board*, 957 F.2d 302, 305 (7th Cir. 1992) (court has not obligation to consider an issue that is merely raised, but not developed, in a party's brief.").

Plaintiff also argues that these rules have been applied so inconsistently that he was deprived of notice that distribution of the news release would violate them. Plaintiff offers several examples of employee speech criticizing the department that he says went unpunished. But almost all of the examples plaintiff provides occurred under a different administration. The only examples of employee speech he provides that occurred during chief Amesqua's administration are a speech by Amesqua herself and comments regarding the Holtz/Cato incident made by the local firefighters union president, Conway, critical of the incident but not alleging favoritism based on sexual orientation or coverup. Plaintiff cites no case law in support of the proposition that a previous superior officer's decision not to enforce departmental rules deprives employees of notice that

those rules may be enforced by a new supervisor. Further, comparison to comments made by Conway is misleading because those comments neither included allegations of wrongdoing nor stated anyone's sexual orientation, both factors that led to plaintiff's discipline. Finally, as plaintiff himself states, he had been disciplined previously by defendant commission on similar grounds and warned that his next discipline would be more sever. Therefore, he cannot prevail on his argument that he was without notice that the rules would be enforced.

d. Denial of opportunity to respond because of commission's reliance on extra-record evidence

Plaintiff contends that defendant commission violated his right to due process by relying on his prior disciplinary record without giving him an opportunity to present evidence that his prior discipline was unjustified. At least some of plaintiff's prior discipline was apparently meted out by the commission itself after hearings similar to the one he received after the news release. Plaintiff offers no support for the remarkable proposition that an employer is required to re-open the proceedings of every previous disciplinary hearing in order to take account of the employee's record in determining his knowledge of workplace rules and the appropriate discipline for a new offense.

Plaintiff cites *Kaczmarczyk v. Immigration and Naturalization Service*, 933 F.2d 588 (7th Cir. 1991), to support the argument that he was denied due process when he was not permitted to rebut defendants' notice of his employment record, including prior discipline. In *Kaczmarczyk*, the Board of Immigration Appeals took official notice that circumstances in Poland had changed so that members of the political organization Solidarity were no longer being

persecuted. The court of appeals hed that the due process clause of the Fifth Amendment required that asylum seekers be allowed the opportunity to rebut officially noticed facts. This critical difference renders *Kaczmarczyk* inapplicable to plaintiff's case. Defendant commission did not violate plaintiff's due process rights when it decided to take notice of plaintiff's prior disciplinary record without allowing him to rebut the disciplinary decisions described in the record.

C. Equal Protection

An equal protection violation occurs when different legal standards are applied to similarly situated individuals because of their membership in a suspect class or "definable minority" or because of the exercise of a fundamental right. *Nabozny v. Podlesny*, 92 F.3d 446, 457 (7th Cir. 1996); *see also Smith on behalf of Smith v. Severn*, 129 F.3d 419, 429 (7th Cir. 1997). If a plaintiff demonstrates that he was treated differently from similarly situated persons because of his membership in a suspect class, then the court applies some form of heightened scrutiny depending upon the suspect class alleged. *See Nabozny*, 92 F.3d at 454. However, dissimilar treatment of dissimilarly situated persons does not violate the equal protection clause. *See Keevan v. Smith*, 100 F.3d 644, 648 (8th Cir. 1996).

Plaintiff contends that, as a male heterosexual, he was treated differently for complaining about favoritism based on sexual orientation in the department from a "'similarly situated' class...composed of those firefighters who have publicly questioned or accused the Department command staff regarding improper favoritism, whether based on race, gender, religion, national origin, sexual orientation or any other characteristic prohibited by law or collective bargaining agreement." Although neither males nor heterosexuals are a "definable

minority," the equal protection clause prohibits disparate treatment of similarly situated persons based upon gender and sexual orientation under a heightened scrutiny and rational basis standard of review, respectively. *See Nabozny*, 92 F.3d at 454. However, plaintiff must first demonstrate that he is similarly situated to persons who do not share those characteristics who were not punished.

Plaintiff provides examples of other firefighters who do not share his characteristics who alleged favoritism in the department but apparently were not disciplined. However, he provides no examples of other firefighters–regardless of characteristics–who interfered with the intensely personal interests of their superior officers by stating their alleged sexual orientations in a news release. Further, he provides no example of other firefighters who alleged that their superior officers engaged in a fraudulent disciplinary investigation and deliberately attempted to conceal wrongdoing. Further, he provides no information regarding the previous disciplinary records of other firefighters who alleged favoritism, a factor that even plaintiff insist was critical to his discipline in this case. Therefore, plaintiff has not demonstrated a class of similarly situated persons. *See Smith*, 129 F.3d at 428. Because dissimilar treatment of dissimilarly situated persons does not violate the equal protection clause, *see Keevan*, 100 F.3d at 648, plaintiff's equal protection claim fails.

ORDER

IT IS ORDERED that:

1. The motion of defendants Debra H. Amesqua, Alan Seeger, Margaret MacMurray, Byron Bishop, Lynn Hobie, Mario Mendoza, The City of Madison Fire Department, The City of Madison, The City of Madison Police & Fire

Commission, and Wisconsin Municipal Mutual Insurance Company for summary judgment is GRANTED; and

2. The motion of plaintiff Ronnie B. Greer for summary judgment is DENIED; and

3. The clerk of court is directed to enter judgment for defendants and close this case.

Entered this 21st day of June, 1999.

BY THE COURT:

/s/
BARBARA B. CRABB

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WISCONSIN.

No. 98-C-0560-C.

RONNIE B. GREER,

Plaintiff,

v.

DEBRA H. AMESQUA, ALAN SEEGER, MARGARET MACMURRAY, BYRON BISHOP, LYNN HOBBIE, MARIO MENDOZA, THE CITY OF MADISON FIRE DEPARTMENT, THE CITY OF MADISON, THE CITY OF MADISON POLICE & FIRE COMMISSION, AND WISCONSIN MUNICIPAL MUTUAL INSURANCE COMPANY,

Defendants.

OPINION AND ORDER

CRABB, District Judge.

Two Supreme Court decisions, *Connick v. Myers*, 461 U.S. 138, 103 S.Ct. 1684, 75 L.Ed.2d 708 (1983), and *Pickering v. Board of Education*, 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968), establish a principle that a public employee is entitled to First Amendment protection for speech that is a matter of public concern provided that the employee's interest in expressing a view on the subject outweighs the harm to a public employer that can result when an employee speaks his or her mind. *Connick* and *Pickering* recognize that the public

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employee's free speech rights and the public's interest in having public employees speak out on the operations of government must be balanced against the need of public employers to maintain order in the workplace so as to be able to serve the public effectively and efficiently.

Plaintiff Ronnie B. Greer was discharged from his position as a City of Madison firefighter because of statements he made about the fire chief and another command officer in a self-styled "news release" entitled "Homosexual Chief rewards Homosexual Chief for Assault?" Plaintiff contends that his discharge violated the First Amendment because under *Connick* and *Pickering*, his news release was a matter of public concern and his free speech interests outweighed any injury to the interests of the fire department. Asserting that the harm to his First Amendment rights is irreparable, plaintiff seeks an injunction requiring his immediate reinstatement.

The request for preliminary injunctive relief will be denied because plaintiff has not shown that he is likely to succeed on the merits of his claim, which is one of the threshold burdens he must meet to be entitled to preliminary injunctive relief. The news release discusses alleged favoritism by the chief toward another command officer because of allegedly shared personal and professional beliefs and sexual orientation. Although defendants contend that plaintiff's news release must be viewed as just part of an "ongoing dispute" plaintiff has with the fire chief, the factual record is too undeveloped at this stage to justify such a conclusion. Because official wrongdoing of the sort alleged in the news release is a matter traditionally recognized to be of public concern, for the sole purpose of determining whether plaintiff is entitled to preliminary injunctive relief, I find that the news release raises a matter of public concern.

However, Connick and Pickering establish that even when a public employee speaks out on a matter of public concern, the speech may jeopardize working relationships among public employees and impair the delivery of governmental services. Thus, the public employer's interest in taking action against the employee may outweigh the employee's free speech rights. I conclude that defendants are likely to show that the fire department has a strong interest in controlling firefighters who make public challenges to the decision making of the chief and speculate publicly about the sexual orientation of command officers and that this interest outweighs plaintiff's free speech interests embodied in his news release. Because of the strong probability that defendants will be able to show that the department's interests outweigh plaintiff's, I conclude that plaintiff has not met his threshold burden of demonstrating a likelihood of success on the merits of his First Amendment claim.

Before turning to the facts and legal analysis, it is necessary to address several issues concerning the scope and nature of proceedings before this court and the evidentiary record. Under Wisconsin law, a person disciplined by a police and fire commission is entitled to judicial review of the commission's decision. *See* Wis. Stat. § 62.13(5)(i). Plaintiff's right to have his discharge reviewed in state court has had two effects on this litigation so far. First, it underlies defendants' arguments that, pursuant to *Younger v. Harris*, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971), this court should abstain from ruling on plaintiff's motion for a preliminary injunction to avoid interfering with ongoing state proceedings and that disputes concerning plaintiff's discharge are not yet "ripe" for Article III purposes. However, the ten-day time limit in which plaintiff could have sought state court judicial review has expired. At the August 18, 1998, hearing in this matter, plaintiff stated that he had abandoned his right to such review. Therefore, there is

no need to consider defendants' *Younger* abstention and ripeness arguments.

Second, plaintiff's right to state court review has influenced the parties' evidentiary presentations and legal arguments. Plaintiff devotes attention to alleged errors in the commission proceedings. Defendants assert that the commission's decision is well-supported. If the parties believe that this court will review the commission's decision in the same manner that a state court would under Wis. Stat. § 62.13(5)(i), they are wrong. The issue before this court is whether plaintiff's discharge violated the Constitution, not whether it comported with state law. There will be no opportunity for the parties to retry matters heard by the commission. Arguments to that effect have been disregarded.

Next, the constitutional issues material to plaintiff's motion for preliminary injunctive relief must be identified. This action is brought pursuant to 42 U.S.C. § 1983. The complaint alleges three causes of action: 1) violation of plaintiff's First Amendment rights resulting from his discharge for statements made in the news release; 2) denial of plaintiff's right to due process of law in the hearings leading to his discharge; and 3) violation of plaintiff's equal protection rights when other firefighters who committed more serious infractions received lighter sanctions. Plaintiff contends that each of these three causes of action warrants injunctive relief requiring his immediate reinstatement, but at the hearing in this matter he conceded that the sole harm to be remedied by his immediate reinstatement is the alleged infringement of his First Amendment rights. He contends that an award of back pay and reinstatement after trial could not compensate him for the interim harm to his First Amendment rights. From plaintiff's concession, it is apparent that his due process and equal protection claims are not material to his current request; any

violation of those rights may be remedied with back pay and reinstatement after trial. Plaintiff's motion for preliminary injunctive relief will be confined to his contention that his news release was protected by the First Amendment and that it was unconstitutional for the department to discharge him for issuing it. Whether commission proceedings violated his due process rights and whether discharge was disproportionately severe in violation of equal protection principles are matters reserved for consideration at a larger stage of this litigation.

Finally, the sources of the factual findings must be discussed. In support of his motion for a preliminary injunction, plaintiff has proposed findings of fact that are supported by a few affidavits and numerous exhibits that were used in the commission proceedings. Defendants have filed a response to plaintiff's proposed findings of fact in which they refer to affidavits filed in this court as well as to plaintiff's exhibits. This court's Procedure to be Followed on Motions for Injunctive Relief contemplates that only evidence that is the subject of a proposed finding of fact will be considered in the analysis. *See* Procedure to be Followed on Motions for Injunctive Relief, ¶¶ II.A.2, III.A.2 (movant's and respondent's obligations). Although no party has indicated that the process of submitting proposed findings of fact is inadequate and that an evidentiary hearing is necessary, plaintiff and defendants both discuss evidence in their briefs that is not the subject of a proposed finding of fact. I understand them to be extending an invitation to the court to review and consider the bulky exhibits and affidavits that are outside the proposed findings of fact and make findings from the record as a whole. This court's procedure makes clear that such invitations will be declined. *See id.* ¶ III.C ("This court does not consider that it is under any obligation to search the record for factual matters that might support either the grant or the denial of the motion.").

Plaintiff's proposed findings of fact and defendants' response reveal the following undisputed facts material to plaintiff's First Amendment claim.

UNDISPUTED FACTS

A. The Parties

Defendant City of Madison is a Wisconsin municipal corporation. Defendant City of Madison Fire Department is a fire department organized under Wisconsin law. Defendant City of Madison Police and Fire Commission is a city commission organized under Wisconsin law. Defendant Debra H. Amesqua is Fire Chief for defendant City of Madison. Defendants Alan Seeger, Margaret MacMurray, Byron Bishop, Lynn Hobbie and Mario Mendoza are members of defendant City of Madison Police and Fire Commission. Defendant "ABC Insurance Company" is the presently unknown firm that provides insurance coverage to defendant City of Madison. Plaintiff Ronnie B. Greer was employed as a firefighter with the City of Madison Fire Department from February 4, 1981, until July 31, 1998, when he was terminated by order of the police and fire commission.

B. Events Leading to Plaintiff's News Release

In January 1996, defendant Amesqua was hired as the new chief of the department. Shortly after her appointment, Amesqua promoted Marcia Holtz from lieutenant to Division Chief in Charge of Training. On October 3, 1996, a local television station broadcast a fire training session as part of a story about the training of Madison firefighters. In the report, Holtz is seen to shove, hit and yell at a recruit named Ron Cato.

Although the propriety of Holtz's conduct towards Cato was

not a topic of the television report, members of the department who happened to watch the news program questioned Holtz's behavior. In a letter dated November 11, 1996, the president of the local firefighters union, Lt. Joseph P. Conway, asked Amesqua to order an independent investigation by the City of Madison attorney because he believed that Holtz's conduct had violated several department rules. Conway advised Amesqua that he had spoken to other recruits and that his conversations led him to believe that Holtz had treated other recruits in the same way she treated Cato. Conway urged that Holtz be suspended during the investigation. In response, Amesqua assigned Assistant Chief Bill Spohn to investigate Holtz's conduct.

Amesqua released her findings on the Holtz investigation in an internal memorandum dated April 9, 1997. In the memorandum, Amesqua notes that Holtz had reported that she was uncomfortable with her treatment of Cato because she had never taken such extraordinary measures. On the basis of this statement and other facts, Amesqua found that Holtz's actions were "not unreasonable under the totality of the circumstances," although she extended Holtz's probation by six months and ordered her to participate in a leadership class.

C. Plaintiff's News Release

On April 28, 1997, approximately three weeks after Amesqua released the internal memorandum, plaintiff issued a "news release" that reads in full as follows:

News Release

Homosexual Chief rewards Homosexual Chief for Assault?

Fire Chief Debra Amesqua issued a decision on the

investigation of an incident involving Training Chief Marcia Holtz and a fired firefighter trainee. In the incident, recorded by WMTV News-15 in October 1996, Chief Holtz shoved and screamed at the trainee during a training exercise. An investigation was ordered and a decision based on the investigation was issued on April 9, 1997. It is Chief Amesqua's conclusion that the "questionable measures" (shoving & screaming) used by chief Holtz were not "unreasonable," and that she simply "needs further guidance and training." That training is to be accomplished by "attending an advance leadership class," a training program which is coveted by other chief officers to the extent that there is a "waiting list" to get in! She has also called for a 6 month extension of chief Holtz's probationary period, something she (Chief Holtz) herself appears to have suggested.

Now this would be laughable [if] it were not such a serious matter. A senior officer in essence, physically and verbally assaults an employee and Chief Amesqua finds that "not unreasonable" and that her screaming was "professional in content and germane". In over 17 years of firefighting with both experienced and non-experience[d] firefighters, I don't believe I've ever seen a situation where it was necessary to physically assault anyone to get their attention or to instruct them. Granted it is often necessary to make physical contact in a fire situation to initiate communication with another firefighter, but never to the extent as we have seen in this incident. So what's so special or different about this case?

I said in October that this matter would be "down played", "swept over" and nothing significant would be done about it. A lot of my fellow firefighters doubted my "prediction." Well, time has "told the story." One does not need to be a prophet, just someone willing to see

things as they are.

Consider the following. One would think that if you wanted to achieve clear facts in investigating a matter of this type it would be only proper to have that investigation done by an independant, disinterested party. However, that is not the case here. The investigation was done by another Division Chief who is subordinate to Chief Amesqua and a staff member with Division Chief Holtz. Is it possible that the investigating officer could have been unduly influenced? Or could the conclusions of the investigation be simply disregarded without opposition by that subordinate?

The relationship between Chief Amesqua and Chief Holtz goes back a ways, namely through their affiliation with an organization called "Women In Fire [Service]", an organization seen by most firefighters in this area as a predominatly homosexual organization. Is it possible that some favoritism has been shown here to a fellow member or possible friend?

Both are homosexual women, who have been seen in the past (and still now among many), with clear agendas as it is concerns women in the fire service. Could it be that their radical agendas has come to play to the extent that even violence can be excused as "glossed over," or in this case, rewarded? Sounds a lot like the much assailed "good-ol-boy" system revived, repainted and given another name.

Now, I'm confused and maybe someone could make sense of this for me; It's not okay to communicate verbally my views on a department chief officer's handling an issue but it's okay to use physical force to

communicate with a trainee? Maybe I'm missing something!

The department/city is willing to spend thousands of dollars on a case of an alleged comment without proof, on alleged harassment without a complaint or proof, and on an alleged rule violation without action or proof, but "winks" at and rewards physical assault?

Another firefighter is given a disciplinary letter and has the same placed in his employment file because he made a remark regarding homosexuals. He was "off-duty" and happened to stop by the fire station. A letter of discipline?

A fire officer is facing a 12 hour suspension for angrily making comments to a uniform delievery driver whom he is familiar with. A 12 hour suspension?

But yet, it's not unreasonable for a chief officer in anger to physically handle an employee? Imagine if it were a white male chief officer showing and screaming at a female recruit. Heads would have rolled! So much for fair treatment and equity! Go figure.

Oh, by the way, that male trainee who was the victim, he was mysteriously "let-go" literally days before graduating from the fire academy. Makes you go, "Hmm."

/s/ Just sharing my thoughts with you all.

The case of alleged sexual harassment plaintiff mentions in the seventh paragraph is one involving his distribution of anti-gay literature entitled "Homosexuality: The Truth." (Disciplinary charges in the matter were initiated against

plaintiff by Amesqua in December 1996.) Also, it is worth noting that Amesqua has not revealed her sexual orientation publicly.

Portions of plaintiff's news release were quoted in a May 1, 1997 article in the Capital Times, which states, in part:

Greer says fire chief plays gay games
Raps treatment of woman in shoving incident

* * * * * *

Madison firefighter Ron Greer has lobbed another Molotov cocktail at his boss, this time accusing Fire Chief Debra Amesqua of meting out lax discipline to a female assistant fire chief.

He also insinuates that it's a lesbian conspiracy.
In a press release titled "Homosexual chief rewards homosexual chief for assault?" Greer implies that Amesqua showed favoritism in an investigation of Assistant Chief Marcia Holtz.
Holtz was accused of using excessive force on a recruit during a live fire training exercise last October.

Neither Amesqua nor Holtz has said anything publicly about their sexual orientations, whether they're gay or straight.

The discipline for Holtz, recently made public, is a six-month extension of Holtz's probation and a requirement that she attend an advanced leadership class. Greer criticizes the sanction, saying that getting to attend a leadership class is a highly sought-after perk, not a penalty.

* * * * * *

Greer, a pastor of a conservative Christian church, has become an anti-gay crusader. He has attacked the chief publicly ever since she came to Madison in January 1996.

Saying Amesqua was unqualified, Greer carried a protest sign when she was sworn in.

Greer himself is facing discipline for insubordination and for handing out anti-gay literature at work. The Madison Police and Fire Commission held roughly 20 hours of hearings on Greer's case and is expected to rule in a few months.

Holtz provided the spark for the latest Greer-Amesqua flap.

* * * * * *

D. The Department's Response

Following plaintiff's issuance of the news release, Amesqua initiated an investigation into whether plaintiff had violated department rules. She directed Assistant Chief Carl Saxe to conduct a pre-determination hearing. Saxe reported to Amesqua that in his view, plaintiff had violated various department rules.

In a letter dated June 10, 1997, Amesqua informed plaintiff that she believed he had committed rule violations that included disseminating a communication with the intent to discredit supervisors and the department and violating the department's rule against harassment of employees on the basis of sexual orientation. Amesqua asked for plaintiff's resignation and told

him that if he did not resign, she would seek his termination before the police and fire commission.

Plaintiff did not resign and Amesqua filed charges. After extensive hearings, the commission concluded that plaintiff's dissemination of the news release violated department rules and that his termination was warranted. In a decision dated July 31, 1998, the commission ordered that plaintiff be discharged.

OPINION

A. Preliminary Injunction Standard

The standard applied to determine whether plaintiff is entitled to preliminary injunctive relief is well established.

> A district court must consider four factors in deciding whether a preliminary injunction should be granted. These factors are: 1) whether the plaintiff has a reasonable likelihood of success on the merits; 2) whether the plaintiff will have an adequate remedy at law or will be irreparably harmed if the injunction does not issue; 3) whether the threatened injury to the plaintiff outweighs the threatened harm an injunction may inflict on defendant; and 4) whether the granting of a preliminary injunction will disserve the public interest.

Pelfresne v. Village of Williams Bay, 865 F.2d 877, 882 (7th Cir.1989). The plaintiff must show some likelihood of success on the merits and that irreparable harm will result if the requested relief is denied. If the plaintiff makes both showings, the court then moves on to balance the relative harms and public interest, considering all four factors under a "sliding scale" approach. *See In re Forty-Eight Insulations, Inc.*, 115 F.3d 1294, 1300-01 (7th Cir.1997).

B. Irreparable Harm

At the outset, defendants argue that plaintiff's motion must be denied because he cannot satisfy the second threshold of establishing irreparable harm. It is plaintiff's contention that because his discharge implicates First Amendment rights, irreparable harm must be presumed if he succeeds in demonstrating a likelihood of success on the merits of his free speech claim. In support, he relies on the Seventh Circuit's and the Supreme Court's decisions in the *Elrod v. Burns* litigation. *See Burns v. Elrod*, 509 F.2d 1133 (7th Cir.1975), *aff'd sub nom. Elrod v. Burns*, 427 U.S. 347, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976).

Elrod v. Burns involved several former employees and one current employee of the Cook County, Illinois sheriff's department who alleged that they had been discharged or were under a threat of discharge solely because of their political affiliation. After an election, the new Democratic sheriff decided to remove Republicans from the department or force them either to join or sponsor the Democratic Party. *See Burns*, 509 F.2d at 1134-35. The district court denied the employees' request for preliminary injunctive relief after determining that back pay provided an adequate legal remedy; in other words, there was no irreparable harm.

The court of appeals rejected the district court's reasoning, ruling that more than a loss of employment was at stake: "Inasmuch as this case involves First Amendment rights of association which must be carefully guarded against infringement by public office holders, we judge that injunctive relief is clearly appropriate in these cases." *Burns*, 509 F.2d at 1136. When the Supreme Court took the case, it agreed with the court of appeals' assessment that the employees had experienced irreparable harm. The Court stated: "The loss of

First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod*, 427 U.S. at 373, 96 S.Ct. 2673.

Plaintiff contends that the rationale of *Elrod v. Burns* applies in this case and that he is not required to make any showing of irreparable harm. In his view, this court should concentrate on the merits of his claim. If he demonstrates a likelihood that his First Amendment rights have been violated, he is entitled automatically to a presumption of irreparable harm curable by an order requiring his reinstatement.

Defendants contend that plaintiff misinterprets the Supreme Court's decision in the *Elrod v. Burns* litigation and ignores later case law. According to defendants, *Elrod v. Burns* was a special case because it involved politically motivated discharges. They argue that in *Elrod*, the Supreme Court did not establish a rule that irreparable harm is presumed to exist in all employment discharge cases implicating First Amendment issues. Defendants support their argument with cases from other circuits decided after *Elrod* that hold as a general matter that no irreparable harm existed because back pay was an adequate remedy.

Defendants' strongest case is *American Postal Workers Union, AFL--CIO v. United States Postal Service*, 766 F.2d 715 (2d Cir.1985), because it addresses *Elrod* directly. After the postal service announced job cuts at his branch, an employee wrote to a local customer and told the customer that its mail was being delayed because of the job cuts. The postal service found that the employee had violated regulations and discharged him. Although the discharge was to be tested in arbitration, the employee would not receive pay pending the outcome of the proceeding. His union moved for a preliminary injunction in federal court seeking to stay the discharge until

the arbitration was completed, allowing the employee to continue to collect his salary. The district court granted the injunction. *See id.* at 717-19.

On appeal, the Second Circuit reversed the award of injunctive relief on the ground that the plaintiff had not shown he would experience irreparable harm. It is significant that the court rejected the union's argument that *Elrod* established a presumption of irreparable harm in First Amendment claims. See id. at 722. The court read *Elrod* to require the party seeking injunctive relief to produce evidence showing that First Amendment interests were " 'threatened or in fact being impaired at the time relief [is] sought.' " *See American Postal Workers*, 766 F.2d at 722 (quoting *Elrod*, 427 U.S. at 373, 96 S.Ct. 2673). Finding that neither the employee's First Amendment rights nor the rights of his fellow employees who remained on the job were in jeopardy during the arbitration, the court of appeals determined that the district court had erred in granting the injunction. *See American Postal Workers*, 766 F.2d at 722; *see also Rendish v. City of Tacoma*, 123 F.3d 1216, 1226 (9th Cir.1997) ("In this circuit, no presumption of irreparable harm arises in a First Amendment retaliation claim ...."); *Hohe v. Casey*, 868 F.2d 69, 72-73 (3d Cir.1989) ("[T]he assertion of First Amendment rights does not automatically require a finding of irreparable injury, thus entitling a plaintiff to a preliminary injunction if he shows a likelihood of success on the merits."); *but see Newsom v. Norris*, 888 F.2d 371, 378 (6th Cir.1989) (rejecting argument that monetary damages and reinstatement are adequate to remedy harm caused by infringement of First Amendment rights). In addition to this case law, defendants rely on logic: while a discharged employee waits for trial, his or her First Amendment rights to speak out are not in jeopardy because the employer has no power to sanction the employee.

Plaintiff replies that the cited cases and arguments are of no moment. Indeed, he concedes that the Second Circuit's decision in *American Postal Workers* is squarely against him. He argues, however, that because the Seventh Circuit has not voiced a similarly restrictive view of the Supreme Court's decision in *Elrod*, this court remains bound to a broad view of *Elrod*, under which a showing of infringement of First Amendment rights results automatically in a presumption of irreparable injury in any type of employment case, not just one involving political employment.

Defendants' arguments concerning *Elrod* are persuasive, but plaintiff is correct that a broad view of *Elrod* is still the rule in the Seventh Circuit. The only Seventh Circuit case that touches on this element of *Elrod* is *Shondel v. McDermott*, 775 F.2d 859 (7th Cir.1985), in which the court intimated that there might be limits to *Elrod* but chose not to rule on the question. Two employees complained that they were discharged for their political affiliation in violation of First Amendment and sought injunctive relief requiring their reinstatement. The court of appeals held that the plaintiffs were not entitled to such relief on other grounds, avoiding the issue of irreparable harm altogether. *See id.* at 866.

Nonetheless, the court of appeals made two important observations:

> *Elrod v. Burns* holds that a litigant who asks for a preliminary injunction to prevent a deprivation of free speech need not show that he will be irreparably harmed if the injunction is denied, because "the loss of First Amendment freedoms, even for minimal amounts of time, unquestionably constitutes irreparable injury."

Shondel, 775 F.2d at 866-67 (quoting *Elrod*, 427 U.S. at 373,

96 S.Ct. 2673). Also, in a latter part of the opinion, the court said:

> The waiver by the Supreme Court in Elrod of proof of irreparable harm in preliminary-injunction cases under the First Amendment rests on the view that the balancing of equities that is undertaken in a conventional equity case is out of place in dealing with rights so important as the modern Supreme Court considers the rights of expression to be.

Id. at 869. There is only one conclusion that can be gleaned from Shondel and from the lack of any case to the contrary: the Seventh Circuit continues to interpret Elrod's waiver of the requirement to make an explicit showing of irreparable harm as applicable in all types of First Amendment discharge cases.

It is true that *Shondel* recognizes that neither court in the *Elrod v. Burns* litigation discussed the remedy of immediate reinstatement, as contrasted with preventing a threatened discharge, and that *Shondel* hints that a claim for reinstatement may be different from a claim to stave off a threatened discharge (the difference being related to the accepted principle that a preliminary injunction should preserve the status quo pending final resolution of the law suit). *See id.* at 867. But *Shondel* does not express any holding to such effect. Accordingly, this court is bound by the broad construction of *Elrod* advocated by plaintiff. If he meets his other threshold burden of probability of success on the merits, he is entitled to a presumption that he has been harmed irreparably.

C. Success on the Merits

Not every work-related utterance of a public employee is protected by the First Amendment. In *Connick v. Myers*, 461

U.S. 138, 147, 103 S.Ct. 1684, 75 L.Ed.2d 708 (1983), the Supreme Court held:

> [W]hen a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters of only personal interest, absent the most unusual circumstances, a federal court is not the appropriate forum to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior.

However, when a public employee does speak on a matter of public concern, *Pickering v. Board of Education*, 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968), holds that the First Amendment protects the employee from discipline, provided the employee's interest in expressing such views is greater than the state's interest in regulating employee conduct so that services are delivered efficiently and effectively. *See Waters v. Churchill*, 511 U.S. 661, 668, 114 S.Ct. 1878, 128 L.Ed.2d 686 (1994) (citing *Connick*, 461 U.S. at 142, 103 S.Ct. 1684, and *Pickering*, 391 U.S. at 568, 88 S.Ct. 1731).

Dishnow v. School District of Rib Lake, 77 F.3d 194, 197 (7th Cir.1996), holds that the analysis of free speech and state interests involved in *Connick* and *Pickering* proceeds in a three step sequence.

1. Would the speech be protected if it were uttered by someone who was not a public employee? This determination is straightforward. For example, a person who is a public employee has no special First Amendment right to falsely shout fire in a theater. *Cf. Schenck v. United States*, 249 U.S. 47, 52, 39 S.Ct. 247, 63 L.Ed. 470 (1919).

2. Is the speech a matter of public concern or is it the

rumblings of a "disgruntled employee whose statements are primarily of personal interest?" *See Colburn v. Trustees of Indiana University*, 973 F.2d 581, 585 (7th Cir.1992) (citing *Connick*, 461 U.S. at 147, 103 S.Ct. 1684). The nature of the employee's speech is a legal question to be answered by the trial judge. *See Marshall v. Porter County Plan Comm'n*, 32 F.3d 1215, 1219 (7th Cir.1994). The judge must determine whether the speech can be "fairly characterized as constituting speech on a matter of public concern," after looking at the "content, form and context of a given statement, as revealed by the whole record." *See Connick*, 461 U.S. at 146, 147-48, 103 S.Ct. 1684.

Seventh Circuit precedent fleshes out *Connick*'s content, form and context guideline. The court has held that content is the most important factor, *see Campbell v. Towse*, 99 F.3d 820, 827 (7th Cir.1996), *cert. denied*, 520 U.S. 1120, 117 S.Ct. 1254, 137 L.Ed.2d 334 (1997), and that the speaker's motive is relevant. *See Linhart v. Glatfelter*, 771 F.2d 1004, 1010 (7th Cir.1985). Specifically, *Linhart* teaches that the aim is to determine the speaker's "point." *See id.*

3. Do the employee's free speech interests in voicing his views outweigh the government's interest as an employer in ensuring that employee discourse does not hamper the efficient delivery of governmental services? *See Wright v. Illinois Dept. of Children & Family Services*, 40 F.3d 1492, 1502 (7th Cir.1994) (citing *Pickering*, 391 U.S. at 568, 88 S.Ct. 1731). This determination is another legal question for the trial judge. *See Campbell*, 99 F.3d at 826. The burden is on the government to establish the greater weight of its interests. *See Glass v. Dachel*, 2 F.3d 733, 744 (7th Cir.1993). In the balancing, the judge must determine whether the public employer has established a "convincing reason" for having taken action against the employee's speech. *See Dishnow*, 77 F.3d at 197;

see also Brown v. Disciplinary Committee of Edgerton Volunteer Fire Dept., 97 F.3d 969, 972 (7th Cir.1996).

A number of criteria are considered in undertaking the *Pickering* balance:

> (1) whether the statement would create problems in maintaining discipline by immediate supervisors or harmony among co-workers; (2) whether the employment relationship is one in which personal loyalty and confidence are necessary; (3) whether the speech impeded the employee's ability to perform her daily responsibilities; (4) the time, place, and manner of the speech; (5) the context in which the underlying dispute arose; (6) whether the matter was one on which debate was vital to informed decisionmaking; and (7) whether the speaker should be regarded as a member of the general public.

Wright, 40 F.3d at 1502. The balancing of these seven criteria in the third step may overlap the analysis of content, form and context undertaken to determine whether the speech was a matter of public concern in the second step. *See Hesse v. Board of Education of Township High School District No. 211*, 848 F.2d 748, 752-53 (7th Cir.1988) (context in which dispute arose is factor in balancing); *Cooper v. Smith*, 89 F.3d 761, 765 (11th Cir.1996) (context and circumstances are considered "again" when balancing); *but see Hesse*, 848 F.2d at 757 n. 7 (Flaum, J., dissenting) (warning against collapse of *Connick*'s public concern determination into *Pickering*'s balancing).

Once the public employee has taken all three steps and the trial judge is persuaded that the employee's speech touches on a matter of public concern and that the balance of interests points in the employee's favor, usually there is the separate task

of determining whether the employee's speech led to the discipline. *See Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274, 287, 97 S.Ct. 568, 50 L.Ed.2d 471 (1977). In this case, however, it is not contested that plaintiff's news release was the cause of his discharge. Also, in some cases there is the related and sometimes difficult task of identifying which element of the employee's speech led to the discharge. *See Wright*, 40 F.3d at 1500. In this instance, however, there is no need to parse plaintiff's news release because defendants do not argue that he was discharged for only some of the things he said in the news release.

Plaintiff breezes through the first step of the analysis. There can be no dispute that his news release addresses matters that would be entitled to First Amendment protection if he had not been working for the department when he issued it.

Whether plaintiff meets the second step is disputed. According to plaintiff, the main point of his news release was to disclose to the local public "unlawful favoritism" on the part of Amesqua. *See* Supp. Br. of Pl. in Supp. of Mot. for Prelim. Inj., dkt. # 12, at 5-6. (Although the police and fire commission's determination on this matter is immaterial in this lawsuit, plaintiff emphasizes that the commission treated the news release as a matter of public concern.) Additionally, plaintiff says that he was disclosing to the public the related matters of Amesqua's "whitewash[ing] of 'the Cato incident' and her 'stonewalling' of intradepartment efforts to determine the extent of Holtz's behavior, including Lt. Conway's request that Amesqua investigate complaints about Holtz by other recruits". *See* Brief of Pl. in Supp. of Pet. for T.R.O., dkt. # 4, at 10-12. At a glance, the title of the news release and discussion of Amesqua's sexual orientation appear out of place in a news release intended to expose errors in her professional judgment, suggesting that plaintiff included the remarks about

sexual orientation to humiliate Amesqua and make the news release titillating. However, plaintiff justifies the reference on the basis that it supplies a possible reason for the display of favoritism to Holtz. *See id.* at 17. Finally, plaintiff concedes that the news release discusses the charges brought against him by Amesqua, but he argues that he added the discussion of his own experience only as another example of Amesqua's poor judgment.

In support of the contention that his news release reveals a matter of public concern, plaintiff relies on *Biggs v. Village of Dupo*, 892 F.2d 1298 (7th Cir.1990). *Biggs* was a police officer who complained during an interview with the local newspaper about the department's inadequate funding and wrongful interference by village officials. *Biggs* made a statement to the effect that local officials were "criminals" and discussed his own problems with local officials, including his being turned down for promotions. *See id.* at 1299-1300. Biggs's speech was found to be a matter of public concern because it was directed mostly at the department's lack of funds and interference by village officials in police matters and because his complaints about the treatment he received were merely an example of the department's problems. *See id.* at 1301-02.

If there is such a thing as a "classic" matter of public concern, exposure of wrongdoing by public officials would be it. Exposing a fire chief's alleged favoritism toward a subordinate officer falls into this category. Indeed, defendants agree that the topic of Amesqua's alleged favoritism is a matter of public concern. However, they argue that there is a personal angle to the news release that is controlling: the news release is not protected speech because it simply is a continuation of an "ongoing personal dispute" between plaintiff and Amesqua.

At this preliminary stage, the determination whether

plaintiff's news release is a matter of public concern turns on the adequacy of the factual record. True, the newspaper articles the parties have placed in the record describe Greer's long-running "flap" with Amesqua. They report that plaintiff is vehemently intolerant of homosexuality. He believes that homosexuality is a sin, that homosexuals should be discriminated against in jobs and housing, that they should not be allowed to hold positions of public authority and that homosexuals molest children and are the cause of human disease. According to the newspapers, Greer was a lone picketer at Amesqua's swearing-in, challenging her appointment because he believed her to be a homosexual. If all this context were evidence, it would be hard for plaintiff to refute defendants' contention that the news release was merely another volley in plaintiff's ongoing feud with Amesqua. But it is not evidence. Despite what the local newspapers say, the present record supports plaintiff's view that his news release was a legitimate attempt to disclose her possible wrongdoing.

Furthermore, when only the content of the news release is considered and not the context, there appears to be merit to plaintiff's argument that he mentioned his personal dispute as but one example of Amesqua's poor decision making. Plaintiff refers not only to his own experiences but also to alleged difficulties that his colleagues have experienced under Amesqua's leadership. He argues that two other firefighters have received discipline harsher that Holtz's although their offenses were not as serious and that recruit Cato left the fire department before graduation, presumably because of undue pressure from department leadership.

Defendants present a separate and distinct but much less developed argument that the discharge of plaintiff did not violate the First Amendment. Although this argument appears to fall outside the three-step Connick and Pickering analysis, it

depends heavily on an assessment of the content of plaintiff's news release. The "argument" consists primarily of a citation to a passage from *Brenner v. Brown*, 36 F.3d 18, 20 (7th Cir.1994) (*per curiam*):

> [E]ven if the speech were protected on the basis, e.g., that it involved a matter of public concern, an employee's speech is not protected where it is made with reckless disregard for the truth, or is otherwise profane and disparaging.

Brenner was a Veterans Administration employee who alleged that she was reprimanded and not promoted because of complaints she made about her supervisor in several letters she sent to administration officials, her state senator and United States senator. In one letter, Brenner accused her supervisor of being "the most devious and sadistic person I have ever met." In another letter, Brenner remarked that although her supervisor had been unmarried for five years, she had a three year old daughter; mockingly, Brenner refused to say "who rumor has it the father is." *See id.* at 20.

The court of appeals agreed with the district court's conclusion that any adverse job action taken against Brenner for her statements did not violate the First Amendment for two separate reasons. First, Brenner failed to present a claim under *Connick* and *Pickering* because any adverse job action taken against her was not the result of "any protected speech;" no First Amendment protection exists for speech "that is of an entirely private concern." *See id.* at 20 (citing *Waters*, 511 U.S. at 674, 114 S.Ct. 1878, and *Connick*, 461 U.S. at 146-49, 103 S.Ct. 1684). Expressed another way, Brenner did not meet the second step.

Alternatively, the court of appeals held that Brenner's First

Amendment claim was properly rejected pursuant to the passage quoted above, because "even if the speech were protected on the basis, e.g., that is involved a matter of public concern, an employee's speech is not protected where it is made with reckless disregard for the truth, or is otherwise profane and disparaging." *Id.* at 20. The meaning of this one-sentence holding is not immediately evident. The court of appeals seemed to be suggesting that even if a public employee's speech can be said to be a matter of public concern, if the speech includes remarks that are factually unsupported or that are profane and disparaging, the employee enjoys no First Amendment protection against subsequent disciplinary action. (It could also be said that *Brenner* involves the first step of the *Connick* and *Pickering* inquiry because profanity or speech uttered with reckless disregard for the truth does not generally enjoy First Amendment protection whether it is spoken by a public employee or by a citizen standing on a street corner.)

Assuming that it is correct to interpret *Brenner* to mean that public employees have no First Amendment protection for speech on a matter of public concern if the speech includes reckless or degrading remarks, I am not persuaded that the holding applies in this instance. With respect to plaintiff's recklessness, defendants argue that plaintiff had "no knowledge" of the investigation that Amesqua ordered concerning the Holtz-Cato incident and therefore had no factual basis for his statement that Amesqua "glossed over" the investigation. But they fail to develop their argument adequately. Defendants do not attempt to answer questions such as whether under Brenner plaintiff would need to establish that he had first hand knowledge of the scope of the investigation, or whether reliable but second hand knowledge would suffice. In addition, the essential questions of what plaintiff knew and when he knew it are issues of fact on which defendants submitted no proposed findings. (Defendants do not

raise it, but it is difficult to imagine that plaintiff had knowledge of Amesqua's sexual orientation either because she has not disclosed it publicly.)

Although I must reject defendants' invitation to apply this aspect of *Brenner*, plaintiff's discussion of Amesqua's sexual orientation is troubling when examined under *Brenner*'s disparaging remark rule. In our society, a remark that another person is a "homosexual" can be viewed as degrading. In light of plaintiff's choice of the title "Homosexual Chief rewards Homosexual Chief for Assault?," and his allegation that because Amesqua and Holtz are gay, they share a "radical agenda," it is hard to accept his contention that he discussed Amesqua's and Holtz's sexual orientation only as a possible reason for Amesqua's display of favoritism toward Holtz. It is even harder to accept his contention if the local newspapers are correct that plaintiff has strong personal beliefs about homosexuality: if a person believes that homosexuality is the cause of human disease, when that person calls someone a homosexual, it can only be viewed as degrading. Although defendants argue that Amesqua's and Holtz's sexual orientation is not a matter of public concern, they acknowledge in their brief that plaintiff's news release "accuses Chief Amesqua of treating another employee differently based on sexual orientation." *See* Defs.' Br. in Opp'n to Pl.'s Mot. for Prelim. Inj., dkt. # 16, at 41. They do not argue that plaintiff's speculation about Amesqua's and Holtz's sexual orientation was intended to be degrading.

Although plaintiff meets the first and second parts of the *Connick* and *Pickering* analysis, he is unlikely to progress further, even though defendants bear the burden of proof at the final step. There are two factors that weigh heavily in favor of the fire department, making it implausible that plaintiff can prevail ultimately.

A line firefighter's public criticism of command may disrupt the working relationships among firefighters. Courts have held that firefighting forces cannot be staffed by persons who have "lingering resentment" towards leadership and that the presence of someone perceived as a "trouble-maker" may impair the effective functioning of the force. *See Janusaitis v. Middlebury Volunteer Fire Dept.*, 607 F.2d 17, 27 (2d Cir.1979); *Germann v. City of Kansas City*, 776 F.2d 761, 765 (8th Cir.1985) (fire captain's continued display of hostility to chief during trial confirms that denying him promotion to battalion chief was appropriate) (citing *Janusaitis*, 607 F.2d at 27); *Marshall v. City of Atlanta*, 614 F.Supp. 581, 583 (N.D.Ga.1984) (department's interest in maintaining authority and harmony outweighs line firefighter's interest in abrasive criticism of officers) (citing *Janusaitis*, 607 F.2d at 26), *aff'd*, 770 F.2d 174 (11th Cir.1985); *see also Shands v. City of Kennett*, 993 F.2d 1337, 1345 (8th Cir.1993) (fire chief's infrequent contact with line firefighter did not lessen department's interest in regulating speech of line firefighters; where fire chief does not closely supervise line firefighters, personal loyalty to chief may be critical). In the news release, plaintiff not only challenges Amesqua's decision making, he comments publicly on her sexual orientation and the orientation of another command officer. At this point, I must assume that plaintiff had a benign reason for talking about this highly personal matter, but that does not negate the fact what he said can have a dramatic effect on departmental operations. No one can question seriously the fire department's need to remove from its ranks a line firefighter who sends a news release to local media that challenges his chief's decision making on an internal personnel matter and speculates about her sexual orientation and that of another command officer.

Plaintiff's decision to spread his views about Amesqua's sexual orientation publicly presented another risk. Although he

may have had a reason to discuss Amesqua's and Holtz's sexual orientation, he did not do so in a neutral tone, but instead labeled homosexuality as a radical agenda. If a fire department took no action against a line firefighter who makes such statements, its inaction could convey to gays and lesbians in the ranks of the fire department and in the Madison community that the department is not concerned with their well being. A fire department must be able to take a strong stance against statements that could be perceived as bigotry, not only to preserve good working relationships in the ranks, but also to assure the entire community that it does not discriminate in the delivery of services.

On the other side, plaintiff contends that his new release embodies free speech interests that are two-fold. One, he asserts that Amesqua's favoritism is damaging the department's "integrity" and that as a firefighter, he has an interest in preserving the reputation of his department. Two, he asserts that Amesqua's favoritism is a matter that can be remedied only through outside intervention. Here, plaintiff relies again on *Biggs*, 892 F.2d at 1298, in which the court of appeals recognized that because employees of a government agency are most likely to have " 'informed' " opinions about the functioning of that agency, " 'it is essential that they be able to speak out freely on such questions without fear of retaliatory [discharge].' " *See id.* at 1303 (quoting *Pickering*, 391 U.S. at 572, 88 S.Ct. 1731). Pursuant to this principle, the court of appeals determined that the free speech interests in Biggs's statements concerning inadequate funding of the police force and interference by local politicians was greater than the state's various interests, including the curtailing of conduct that might impede discipline and harmony. See id.

These asserted interests are not enough to tip the balance back in plaintiffs favor. First, accepting that Amesqua's

favoritism is damaging the department's reputation, plaintiff's interests in preserving that reputation are at the very least matched by the department's interest in taking a stand against bigotry. Second, the claim that plaintiff is like officer Biggs has no merit. There is a critical distinction between what Biggs said during his interview with the local newspaper and what plaintiff said in his news release: officer Biggs did not challenge the decision making of his supervisors; he challenged only the decision making of village officials. In fact, Biggs complained that village officials did not heed the judgment of departmental officials. He was quoted as saying that his former chief "was smarter than the politicians.... He knew all the aspects about the law." *See Biggs*, 892 F.2d at 1307. Many people have complaints about local politicians; Biggs's complaint was a generalized one to the effect that local politicians did not treat the force properly. Although Biggs's speaking his mind on such a matter might not have helped relations between the village and the police department, his statements gave no indication that he would not follow orders from his supervisors or be able to get along with his fellow officers.

I reject plaintiff's contention that his interest in speaking out about Amesqua's favoritism is greater than the harm that such statements might have on order among the ranks and ultimately on the department's ability to fight fires effectively. In undertaking the balancing in this case, I have given no weight to two additional matters that plaintiff argues should tip the balance in his favor: 1) the "truth" of his comment that Holtz's conduct is considered unacceptable in professional circles and 2) the lack of evidence showing that the news release actually disrupted departmental operations. Plaintiff is wrong in thinking that these factors are material.

The Seventh Circuit does not hold to a principle that

especially true statements of public employees receive more consideration in the Pickering balance. *See Johnson v. Multnomah County*, 48 F.3d 420, 424-25 (9th Cir.1995) (split of circuits on issue whether recklessness of factual statements is element of *Pickering* balance; Seventh Circuit holds view that reckless statements are not entitled to First Amendment protection per se) (citing *Brenner*, 36 F.3d at 20). Indeed, *Brenner* intimates that a public employee cannot even get to the third part of the *Connick* and *Pickering* analysis if his statements do not have at least a basis in fact. I have rejected defendants' presently undeveloped argument that plaintiff cannot satisfy the second part of the analysis because he had no personal knowledge of the matters discussed in his news release; in other words, defendants have not established that plaintiff is not entitled to First Amendment protection because some of plaintiff's statements in his news release were untrue. However, in this circuit, there is no opposite rule that plaintiff's actual knowledge concerning the internal matters he discusses in the news release has bearing on the determination whether it was necessary for the department to take action against him for speaking out on such matters.

Plaintiff's argument that defendants have not presented evidence revealing that his news release actually caused disruption among the ranks may be disposed of swiftly: "The public employer is not required to wait until actual disruption occurs.... Where employee speech carries the potential to be disruptive, the public employer must have the ability to move quickly." *Khuans v. School District 110*, 123 F.3d 1010, 1014 (7th Cir.1997) (emphasis added) (citing *Connick*, 461 U.S. at 152, 103 S.Ct. 1684).

D. Summary

Plaintiff has not met the two threshold burdens necessary to

his obtaining preliminary injunctive relief. His ability to establish irreparable harm is linked to his ability to demonstrate a likelihood of success on the merits of his First Amendment claim. On the merits, although his news release may be a matter of public concern, defendants have a strong likelihood of success on their claim that the department's interest in running a department that can serve the public effectively outweighs plaintiff's free speech interests in his news release. Consequently, because plaintiff has not shown a likelihood of ultimate success on the merits of his First Amendment claim, his motion for preliminary injunctive relief must be denied.

ORDER

IT IS ORDERED THAT the motion of plaintiff Ronnie B. Greer for a preliminary injunction is DENIED.

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

JUNE 21, 2000

Before

Hon. WILLIAM J. BAUER, *CIRCUIT JUDGE*
Hon. KENNETH F. RIPPLE, *CIRCUIT JUDGE*
Hon. MICHAEL S. KANNE, *CIRCUIT JUDGE*

RONNIE B. GREER,
Plaintiff-Appellant,

No. 99-2767.

v.

DEBRA H. AMESQUA, ALAN SEEGER, MARGARET MACMURRAY, BYRON BISHOP, LYNN HOBBIE, MARIO MENDOZA, THE CITY OF MADISON FIRE DEPARTMENT, THE CITY OF MADISON, THE CITY OF MADISON POLICE & FIRE COMMISSION, AND WISCONSIN MUNICIPAL MUTUAL INSURANCE COMPANY,

Defendants-Appellees.

Appeal from the United States District Court for the Western District of Wisconsin

No. 98 C 560

Barbara B. Crabb,
Judge

ORDER

On consideration of the petition for rehearing and petition for rehearing *en banc,* and all of the judges on the original panel have voted to deny rehearing. It is, therefore, ORDERED that rehearing and rehearing *en banc* are DENIED.

BEFORE THE BOARD OF POLICE AND FIRE COMMISSIONERS
OF THE CITY OF MADISON

Debra H. Amesqua,
Complainant
vs. Decision and Order

Firefighter Ronnie B. Greer
Respondent.

Synopsis

This case, filed on July 28, 1997, is the fifth statement of charges against Ronnie B. Greer filed by a fire chief with this Board. This complaint alleges violations of four department rules and of a City of Madison administrative memorandum. Following extensive hearings and deliberations the Board has found Respondent Greer culpable on all counts as alleged, and imposes on each count the penalty of discharge from the fire service.

Procedural Background

This matter comes to us on a Statement of charges by Debra H. Amesqua, Fire Chief for the City of Madison, against Firefighter Ronnie B. Greer, filed with the Board on July 28, 1997. Five separate counts of the charges allege violations of the rules of the Madison Fire Department and of Administrative Procedure Memorandum 3-5 of the City of Madison. Chief Amesqua has been represented by Assistant City Attorney Rick Petri. Respondent Greer has been represented by Attorney Michael Dean.

After preliminary proceedings we first convened an Evidentiary hearing on September 29, 1997, recessing and reconvening for several sessions over several months. Testimony was closed on March 19, 1998, and the parties stipulated to a briefing calendar for final arguments. We received the final briefs of the parties on May 26, 1998, as scheduled. Briefs were distributed to commissioners for individual review prior to deliberation; we have also had individual reference access to the complete hearing transcript of 543 pages and to the 88 marked exhibits. Commissioners reconvened for deliberations on several occasions and have unanimously reached the decision which we announce in this document.

In our deliberations we have thoroughly reviewed the record, although it has not been practical to refer specifically to each exhibit in this decision; we have carefully weighed the credibility and demeanor of all witnesses, although it has not been practical to describe in detail how each element of our decision reflects such judgments. In general, we have found that the evidence sustains the charges brought by Chief Amesqua, and we have rejected the constitutional arguments and defenses proposed by respondent.

Our disciplinary decisions are subject to 62.13, Wisconsin Statutes, as amended notably by 1993 Wisconsin Act 54, effective November 24, 1993. That amendment set forth in an entirely new subsection the standards which the Board must use in imposing discipline, summarized generally as "just cause" and known colloquially as the "seven standards:"

[WS 62.13]
(em) No subordinate may be suspended, reduced in rank, suspended and reduced in rank, or removed by the board under par. (E), based on charges filed by the board, members of the board, an aggrieved person or the chief under par. (B), unless

the board determines whether there is just cause, as described in this paragraph, to sustain the charges. In making its determination, the board shall apply the following standards, to the extent applicable:

1. Whether the subordinate could reasonably be expected to have had knowledge of the probable consequences of the alleged conduct.
2. Whether the rule or order that the subordinate allegedly violated is reasonable.
3. Whether the chief, before filing the charge against the subordinate, made a reasonable effort to discover whether the subordinate did in fact violate a rule or order.
4. Whether the effort described under subd. 3. Was fair and objective.
5. Whether the chief discovered substantial evidence that the subordinate violated the rule or order as described in the charges filed against the subordinate.
6. Whether the chief is applying the rule or order fairly and without discrimination against the subordinate.
7. Whether the proposed discipline reasonably relates to the seriousness of the alleged violation and to the subordinate's record of service with the chief's department.

On their face these standards seem designed to guide a review of discipline previously imposed, even though it is our statutory task to consider the initial imposition of discipline. The statute directs us to follow the seven standards "to the extent applicable." Whenever we deliberate within the framework of the seven standards we struggle to conform our decision-making to the rigid and sometimes inapposite statutory instructions. In this decision, after addressing preliminary matters, we summarize our examination of each the counts of the Statement of Charges in the light of each of the seven standards.

Decision

Preliminary Matters: Motion for Recusal In a written motion dated September 28, 1997, Respondent sought recusal of the commissioners. We took this motion under advisement during the course of the proceedings. We now deny the motion. We are each confident that individually and as the duly appointed Board we have and will exercise our judgment on the basis of the evidence adduced in this case, acting fairly, impartially, and in good faith, in accordance with the standard articulated for us by the Wisconsin Supreme Court in *State ex rel. Richey v. Neenah Police and Fire Commission*, 48 Wis. 2d 575, 180 NW2d 743 (1970). Without discussing fully all issues and challenges proposed by Respondent's argument in support of the motion to recuse, we observe the following:

1. Three of the five commissioners participating in this case have acted on at least one previous statement of charges against this respondent. WS 62.13 clearly envisions that the Board will act in all cases brought to it, including multiple cases against the same respondent; in fact we are specifically instructed by the statute to consider the record of a respondent in weighing discipline. Knowledge of previous cases does not disqualify us from making fair and informed factual decisions on the evidence before us.

2. Respondent notes that three current commissioners were defendants in a Wisconsin Equal Rights Division proceeding in which a probable cause finding was issued. Respondent neglects to note that the ERD proceeding was subsequently dismissed with prejudice.

3. Respondent's motion pagers characterize his own testimony in a previous proceeding as "attacks on the integrity of the PFC." We are puzzled by this characterization. He has

expressed dissatisfaction with the Wisconsin statutory plan for governing personnel matters of police and fire departments; he believes that commissioners appointed by a mayor as our statute requires cannot fairly handle both hiring and disciplinary responsibilities. These views are not personal attacks on the current commissioners.

4. This Board is the only body which may properly hear these charges. Recusal *en banc* would deprive the City, the public, this complainant, and any other prospective complainant of any proper venue or channel of accountability.

5. The disciplinary decisions of this Board are subject to unusually broad judicial review. Under current review standards established at WS 62.13(5)(i), the ultimate responsibility of this Board is the compilation of a record available for thorough review in Circuit court, which does not merely affirm or overrule our decision but which answers independently the question: "Upon the evidence is there just cause...to sustain the charges against the accuse?" This remarkable scope of review provides sufficient recourse to this respondent for any possible hypothetical bias of this Board.

Preliminary Matters: Evidentiary Rulings (1) At an early point in the evidentiary proceedings we advised respondent's counsel that we would accept a written offer of proof pertinent to several rulings excluding evidence or lines or inquiry proposed by respondent. Respondent has filed his offer during the course of the post-evidentiary briefing. (2) We take notice of the records of prior cases before this Board in which respondent has been a party, for the limited purposes of considering respondent's knowledge of department rules and his record of service and weighing the appropriate penalty.

Charges

The Complaint recites Rule 1, which is a basic, general statement of the duties of employees to know and obey the rules and orders of the department. We do not construe the Complaint or the evidence as establishing a violation of Rule 1 distinct from violations of the more specific rules which we identify for the purposes of this decision as "counts" of the complaint. All counts address the conduct of respondent in disseminating a document entitled "New Release//Homosexual Chief rewards Homosexual Chief for Assault?," received in evidence as Exhibit 7. Respondent in his Answer dated August 28, 1997, and at hearing did not dispute his authorship and initial distribution of Exhibit 7 to the Madison *Capital Times* newspaper in which it was ultimately reported, but he disclaimed responsibility for subsequent news coverage and asserted several defenses based on the United States and Wisconsin constitutions.

Count A, Rule 51: *Officers and members shall at all times conduct themselves so as not to bring the Department in disrepute.*

General Comments We construe this rule to prohibit conduct which might reasonably be expected to bring the department into disrepute. We do not require proof of the actual damage to the department's reputation.

The Seven Standards

1. Whether the subordinate could reasonably be expected to

The department rules are basic, long-standing, and well known. Respondent has been brought before the Board for violations of these rules in at least 4 previous cases (*Roberts v. Greer*, October 1987, *"Greer I;"*

have had knowledge of the probable consequences of the alleged conduct.

Roberts v. Greer, August 1993, *"Greer II;" Roberts v. Greer,* November 1994, *"Greer III;" Amesqua v. Greer,* February 1997, *"Greer IV."*) Respondent's unique history has acquainted him fully with the rules and with the consequences of violations.

2. Whether the rule or order that the subordinate allegedly violated is reasonable.

Respondent does not argue that this rule is unreasonable on its fact, and seems implicitly to accept the reasonableness of the rule *per se* in his argument about its application to his situation. In his defense before this Board in *Greer III,* respondent stipulated to the reasonableness of Rule 51. We do not presume that he is bound now by that stipulation, but we do conclude that Rul3 51 is reasonable. The department and city have a valid interest in the good reputation of the department, which is essential to the internal life of the department as well as to public confidence in and support of department operations.

Respondent's defense on this count first raises the constitutional issues which come into sharper focus on later counts. In short, respondent claims the right to speak freely despite apparent violation of Rule 51 and other standards, because his speech alleges serious official misconduct. We don't think his allegations provide the shield he needs and claims for this and later counts.

We do not claim judicial expertise in constitutional analysis and deal primarily

with the factual and practical aspects of the matter. We realize that our role as the initial, quasi-judicial tribunal in disciplinary matters may require us to weigh the interests of the respondent in commenting on public affairs against the public employment interest of the department, and from time to time we have engaged in this balancing test, identified usually with *Pickering* v. Board of Education, 391 U.S. 563, 88 S. Ct. 1731 (1968). In fact, we were required to conduct this balancing test in this respondent's immediately prior cases before us, *Greer III* and *Greer IV,* in which respondent advanced constitutional defenses to various charges. This Board also considered this balance of interests in *Durkin v. Gilber*, in which we confirmed the validity of APM 3-29 (now APM 3-5) and were affirmed upon judicial review.

Our understanding of the constitutional defense claim may be reformulated under the *Pickering* analysis in these terms: Firefighter Greer's interests in expressing his views regarding department management were remote, largely personal, and insignificant in comparison to the legitimate interests of the department and the public in maintaining orderly administration of department affairs and a harassment-free work environment for all department employees.

The limited weight to be accorded to Greer's

interest is reflected in several factors. In content, his remark are shallow; uninformed and uninformative, not based on direct knowledge or claims of direct observation and are essentially derivative descriptions of events in which he was neither a party nor an observer. In form, his remarks did not take any available constructive avenue of complaint or grievance reasonably calculated to initiate positive action, response, or even debate by the department or city officials, but were merely a gratuitous "news release." In context, his remarks were released during the pendency of prior, well-publicized charges before us (*Greer IV*) and refer specifically to his own plight as the subject of department discipline. Thus, even though Greer claims to address public concerns regarding the fairness of fire department management practice–a claim which we acknowledged in or evidentiary rulings on complainant's motion *in limine*–their contribution to the topic is negligible and deserves little wight in comparison to the legitimate public and governmental interests expressed in the department rules, APM 3-5, and in these charges.

We are especially mindful of the need for mutual respect and unit cohesion in the demanding context of emergency services; historically described as para-military, the police and fire departments simply must work with trust, cooperation, and responsiveness. The public interest in the

efficient functioning of this workplace is exceptionally vital. This comparison of interests is sufficient to reject the constitutional defense.

3. Whether the chief, before filing the charge against the subordinate, made a reasonable effort to discover whether the subordinate did in fact violate a rule or order.

This standard poses serious technical difficulties if taken literally. This Commission does not, of course, sit to review the decision of the Chief. Surely our evidentiary hearing must be understood as the primary vehicle by which to determine whether the respondent did in fact violate a rule or order. Yet this standard and the standards following it are phrased in terms of review of the chief's pre-hearing conduct, that is, her charging decision. We would prefer to construe this relatively new statute as consis tently as possible with our straightforward conventional duty to try the case filed against respondent and not undertake a new responsibility of reviewing the charging procedures and decisions of complainants. Yet these standards 3. through 7. Seem to direct our attention to the internal procedures of the department and the pre-hearing decisions of the Chief. (These standards are even more anomalous when we hear charges brought by citizen complainants.) Perhaps these standards also imply a duty explicitly to examine our own proceedings. We conclude that we must make a three-fold determination:

1. The evidence has demonstrated clearly and to our satisfaction that Chief

Amesqua and the department conducted a reasonable investigation before filing these charges. We are fully satisfied that the investigation constituted at least a reasonable effort to discover the facts of the matter, and whether respondent did in fact violate a rule or order, including Rule 51. We note that this effort by the chief probably justifies the statement of charges under the analysis of constitutional claims adopted by the U.S. Supreme Court in *Waters v. Churchill*, 511 US 661 (1994).

2. We believe that our own proceedings have constituted a reasonable effort to determine the merits of the charges.

3. As we have discussed in our general comments, above, we have been persuaded by the evidence that respondent violated Rule 51.

4. Whether the effort described under subd. 3. was fair and objective.

We refer back to our discussion of the ambiguities of the seven standards as guidelines for our initial, non-appellate disciplinary decisions. We have determined that:

1. The Chief's investigation was fair and objective, following all customary and established procedures for pre-determination review, representation by advocate or counsel, and disclosures.

2. We are fully satisfied that our own proceedings have been fair and objective. We conducted numerous hearing sessions over many months, compiling 543 pages of transcript and 88offered exhibits, plus an elaborate written offer of proof filed by respondent. We have listened attentively, read carefully, and deliberated thoroughly and at length before reaching our decisions on each of the allegations.

5. Whether the chief discovered substantial evidence that the subordinate violated the rule or order as described in the charges filed against the subordinate.

Standard 5. Is the one of the seven standards which goes most directly to the issue of culpability, and in doing so it poses an additional interpretive challenge. *Substantial evidence* is a conventional formulation of an appellate review standard, and in this context reinforces an inappropriate view of our process as an appellate process rather than an initial imposition of discipline. The burden of proof to be applied by Commissioners under WS 62.13(5) prior to 1993 Wisconsin Act 54 was well established as the "preponderance of the evidence," which is the usual minimum civil burden of proof but which is also significantly greater than "substantial evidence." Should we conclude that the seven standards lowered the burden of proof?

We decline to do so, at least until so directed by the body of judicial authority which will be evolving as cases are decided under WS 62.13(5)(em). No officer should be subject

to discipline without a showing of culpability by a preponderance of the evidence. To do so would probably be unconstitutional even if authorized on the fact of the statute. We determine as follows:

1. We have concluded that Chief Amesqua discovered substantial evidence that respondent violated department rules, including Rule 51.

2. We have concluded that substantial evidence constituting at least a preponderance of the evidence in our proceedings has demonstrated that respondent prepared and distributed Exhibit 7; indeed, respondent acknowledges doing so. We have also concluded that respondent's actions violate Rule 51. Exhibit 7 recalls for us the spirit of the outbursts, insubordination, yelling, door slamming and general pique which led to discipline in *Greer III* and *Greer IV*.

6. Whether the chief is applying the rule or order fairly and without discrimination against the subordinate.

We refer back again to our discussion of the interpretive difficulties posed for us by the seven standards. We have determined that:

1. Chief Amesqua has applied Rule 51 fairly against respondent and without discrimination. We find no support anywhere in our record for any contrary conclusion.

2. In acting under and applying Rule 51 we are acting fairly and without discrimination.

7. Whether the proposed discipline reasonably relates to the seriousness of the alleged violation and to the subordinate's record of service with the chief's department.

We are not obliged to impose the same discipline as proposed by a complainant, whether chief or citizen. In those cases where we disagree with a proposed discipline, or where no specific discipline is proposed, it might be clearer than this standard guides our own decision rather than a hypothetical review of the complainant's proposal. This Statement of Charges seeks discharge as a general penalty for all counts but does not specify a separate proposed discipline for each count. As penalty for the violation of Rule 51 set forth in Count A we impose the penalty of separation and discharge from the service.

In making this determination we have considered respondent's record of service but find nothing there which ameliorates the gravity of this misconduct. On the contrary, and as we noted in our decision in *Greer IV* imposing a substantial suspension, we find respondent's record generally, and before this Board in particular, to be uniquely abysmal and disheartening. The current case is now the fifth time that respondent has been before this Board on charges brought by a chief, all of which have been meritorious. As we noted in our decision in *Greer IV*, Greer's "record in these cases and in other respects reflected in this record

> shows persistent incapacity to conform himself consistently to the appropriate requirements of ordinary civil conduct reasonably expected of any public employee, especially a sworn fire officer. In attempting to impose suspension in her letter of November 27, 1996..., chief Amesqua encouraged respondent to improve his conduct and cautioned him that future misconduct would result in more serious penalties. We are not overly confident that this discipline will accomplish a change in respondent' pattern of conduct." Four Board suspensions are enough. As we warned respondent in our previous decision, we will not suspend him again.

Count B, Rule 18 Respect for superiors: *Members shall... treat their superiors with respect...Member... shall conform to the rules and regulations of the Department, observe the laws and ordinances, and render their services to the city with zeal, courage and discretion and fidelity.*

General Comments Respect does not require unquestioning acceptance of all actions by all superiors, but does require conforming affirmatively to the rules and regulations. Rule 18 does not mean merely avoiding direct violations of proscriptive standards but also calls for constructive use of channels and means of criticism.

The Seven Standards We refer back to our general comments about each of the standards in our discussion of the first count and add here only additional comments related to the second

count.

1. Whether the subordinate could reasonably be expected to have had knowledge of the probable consequences of the alleged conduct.

2. Whether the rule or order that the subordinate allegedly violated is reasonable.

3. Whether the chief, before filing the charge against the subordinate, made a reasonable effort to discover whether the subordinate did in fact violate a rule or order

We have determined that the elements of standards 1. through 4. Have been established. Our view of respondent's constitutional claims for disrespectful speech is essentially the same as our view of his claims under count A, Rule 51

4. Whether the effort described under subd. 3. was fair and objective.

5. Whether the chief discovered substantial evidence that the subordinate violated the rule or order as described in the charges filed against the subordinate

As noted, the critical factual elements of respondent's conduct are thoroughly established and clear on the record.

6. Whether the chief is applying the rule or order fairly and without discrimination against the subordinate.

We refer to our prior general discussion of this standard. We find no credible suggestion or evidence that the chief seeks to apply these rules in any inappropriate way to or against this respondent.

7. Whether the proposed discipline reasonably relates to the seriousness of the alleged

As we noted , the Statement of Charges does not propose or recommend a penalty specifically for each count. We have weighed this violation carefully, giving weight to the persistence of respondent's disrespectful conduct over several years as reflected in his cases before this Board. For

violation and to the subordinate's record of service with the chief's department.

his violations pertaining to count B of these charges we impose the penalty of separation and discharge from the service.

Count C, Rule 39: *Members must conform to and promptly and cheerfully obey all laws, ordinances, rules, regulations, and orders, whether general, special or verbal, when emanating from due authority. They shall be strictly on time to the minute, and obedience must be prompt, implicit, unqualified and unequivocal.*

The Seven Standards We refer back to our general comments about each of the standards in our discussion of the prior counts and add here only additional comments related to the third count.

1. Whether the subordinate could reasonably be expected to have had knowledge of the probable consequences of the alleged conduct.

2. Whether the rule or order that the

subordinate allegedly violated is reasonable.

3. Whether the chief, before filing the charge against the subordinate, made a reasonable effort to discover whether the subordinate did in fact violate a rule or order

4. Whether the effort described under subd. 3. was fair and objective.

We refer again to our previous comments about standards 1. through 6. We have determined that the elements of these standards have been established. We add that Rule 39 reasonably affirms the positive duty of sworn fire officers to act constructively and affirmatively within the framework of department rules and procedures. The chief's procedures and conclusions were reasonable, fair, and objective, and are supported on the record in our proceedings.

5. Whether the chief discovered substantial

evidence that the subordinate violated the rule or order as described in the charges filed against the subordinate

6. Whether the chief is applying the rule or order fairly and without discrimination against the subordinate.

7. Whether the proposed discipline reasonably relates to the seriousness of the alleged violation and to the subordinate's record of service with the chief's department.

As before, the Statement of Charges does not specify a proposed penalty for this violation. We impose the penalty of separation and discharge from service.

Count D, Rule 65: *Employees shall not harass co-employees because of their sexual orientation either by the use of*

derogatory verbal or written comments, graphic materials, gestures or conduct which would interfere with the performance of their duties. "Sexual orientation" means having a preference for heterosexuality, homosexuality, bisexuality, having a history of such a preference, or being identified with such a preference.

General Comments The gravamen of this charge is that Greer's accusations of wrongdoing against several department managers ("derogatory verbal or written comments") were attributed in two instances to sexual orientation.

The Seven Standards

1. Whether the subordinate could reasonably be expected to have had knowledge of the probable consequences of the alleged conduct.	We refer again to our previous comments about standards 1. through 6. We have determined that the elements of these standards have been established.
2. Whether the rule or order that the subordinate allegedly violated is reasonable.	Rule 65 is a reasonable administrative expression of non-discriminatory public policy.
3. Whether the chief, before	

filing the charge against the subordinate, made a reasonable effort to discover whether the subordinate did in fact violate a rule or order

4. Whether the effort described under subd. 3. was fair and objective.

5. Whether the chief discovered substantial evidence that the subordinate violated the rule or order as described in the charges filed against the subordinate.

Exhibit 7 accuses several individuals of highly improper conduct. The misconduct of two of those individuals is attributed to their sexual orientation. The Exhibit 7 on its face constitutes sexual harassment of those two individuals under Rule 65.

Respondent claims constitutional privilege for his accusations because official misconduct is a serious matter of public concern. However, we do not perceive an all-inclusive constitutional permit for critical, derogatory, or insubordinate comments merely because the disrespect runs deep enough. Respondent's "new release" claims no particular knowledge or information about the incidents underlying

	the accusations; respondent took no appropriate or constructive steps to initiate or support a serious investigation or review of the accusations. The interests of the department, the city, and the public generally reflected in Rule 65 easily outweigh the constitutional claims for Exhibit 7. The department and the city reasonably may enforce Rule 65 against their employees under these conditions.
6. Whether the chief is applying the rule or order fairly and without discrimination against the subordinate.	We refer to our prior general discussion of this standard. We find no credible suggestion or evidence that the chief seeks to apply these rules in any inappropriate way to or against this respondent.
7. Whether the proposed discipline reasonably relates to the seriousness of the alleged violation and to the subordinate's record of service with the chief's	As we noted, the Statement of Charges does not propose or recommend a penalty specifically each count. For his violations pertaining to count D of these charges we impose the penalty of separation and discharge from service.

department.

Count E, APM 3-5: APM 3-5 is a three-page document attached as an appendix to this DECISION AND ORDER.

General Comments We have concluded that the preparation and distribution of Exhibit 7 violated APM 3-5.

The Seven Standards

1. Whether the subordinate could reasonably be expected to have had knowledge of the probable consequences of the alleged conduct.

APM 3-5 is a City-wide policy first promulgated in 1980 as APM 3-29, implementing City ordinances, and has been the basis of Board discipline. The City and the Department have periodically restated APM 3-29 and have conducted employee training on it. Respondent has participated in such training and received a copy of the memorandum.

2. Whether the rule or order that the subordinate allegedly violated is reasonable.

Since original promulgation this memorandum has provided a practical, balanced, and effective regulation of the manner, occasion, and time of public employee conduct and speech. This Board implicitly accepted the reasonableness of APM 3-29 in deciding *Durkin v. Gilbert* (see Exhibit 53) and our decision was upheld on appeal to Dane County Circuit Court. We have confirmed our view that APM 3-5 is a reasonable and appropriate balancing of public and individual interests, intended and effective in accomplishing valid policies of

non discrimination and diversification in public employment with minimal infringement on personal or political activities. The basic but abstract legal prohibitions of discrimination would be empty platitudes without the practical mechanisms and guidance for the workplace of APM 3-5 or similar policy statements; the city as employer would be negligent toward the law if it did not both provide positive leadership and enforce boundaries to conduct affecting the workplace environment of employees of protected classes.

3. Whether the chief, before filing the charge against the subordinate, made a reasonable effort to discover whether the subordinate did in fact violate a rule or order

As before, we have concluded that standards 3. through 6. Have been met.

4. Whether the effort described under subd. 3. was fair and objective.

5. Whether the chief discovered substantial evidence that the subordinate violated the rule or order as described in the charges filed against the subordinate.	The harassing character of Exhibit 7, and specifically its contribution to a harassing work environment, are apparent to a reasonable reader. The harassing effect of the exhibit includes, for example, the potential for exposing the individuals mentioned to contempt, ridicule, and distrust by co-workers and the public due to respondent's allegations regarding such persons' conduct and sexual orientations.
6. Whether the chief is applying the rule or order fairly and without discrimination against the subordinate.	
7. Whether the proposed discipline reasonably relates to the seriousness of the alleged violation and to the subordinate's record of service with the chief's department.	As penalty for the violation of APM 3-5 set forth in count E we impose the penalty of separation and discharge from the service.

Order

Pursuant to 62.13(5)(e), Wisconsin Statutes, we order as follows:

1. As penalty for misconduct alleged in Count A of the Statement of Charges, Respondent Firefighter Ronnie B. Greer is separated and discharged from the Madison Fire Department, effective immediately.

2. As penalty for misconduct alleged in Count B of the Statement of Charges, Respondent Firefighter Ronnie B. Greer is separated and discharged from the Madison Fire Department, effective immediately.

3. As penalty for misconduct alleged in Count C of the Statement of Charges, Respondent Firefighter Ronnie B. Greer is separated and discharged from the Madison Fire Department, effective immediately.

4. As penalty for misconduct alleged in Count D of the Statement of Charges, Respondent Firefighter Ronnie B. Greer is separated and discharged from the Madison Fire Department, effective immediately.

5. As penalty for misconduct alleged in Count E of the Statement of Charges, Respondent Firefighter Ronnie B. Greer is separated and discharged from the Madison Fire Department, effective immediately.

Approved following deliberations,
and
filed with the Secretary this 31st day of July, 1998:

MADISON BOARD OF POLICE AND FIRE COMMISSIONERS

/s/
Alan Seeger, President

/s/
Margaret McMurray, Secretary

/s/
Byron Bishop, Vice-president

/s/
Lyn Hobbie, Commissioner

/s/
Mario Mendoza, Commissioner

62.13. Police and fire departments. (1) Commissioners. Except as provided in sub. (2m), each city shall have a board of police and fire commissioners consisting of 5 citizens, 3 of whom shall constitute a quorum. The mayor shall annually, between the last Monday of April and the first Monday of May, appoint in writing to be filed with the secretary of the board, one member for a term of 5 years. No appointment shall be made which will result in more than 3 members of the board belonging to the same political party. The board shall keep a record of its proceedings.

(2) Exception. (a) Except as provided under sub. (6m), subs. (1) to (6) shall not apply to cities of less than 4,000 population except by ordinance adopted by a majority of all the members of the council. A repealing ordinance may be adopted by a like vote.

(b) A city that creates a joint police or fire department with a village under s. 61.65 is not required to create a separate board of police and fire commissioners under this section. The city shall create a joint board of commissioners to govern the joint department, as required in s. 61.65. If the city also creates one separate protective services department in addition to the joint protective services department, the city shall create a separate board of commissioners to govern that department. A city's joint board of commissioners is subject to s. 61.65(3g)(d). A city's separate board of commissioners is subject to this section.

(2m) Joint departments, contract services. (a) A city may create a joint police department or a joint fire department, or both, with another city.

(b) A city that creates a joint police department or a joint fire department, or both, with another city under par. (a) is not required to create a separate board of police and fire commissioners under this section. The cities shall create a joint board of commissioners to govern the joint department. If only one joint department is created, each city shall retain its existing board of police and fire commissioners to govern the separate department. The cities may jointly determine the number of commissioners to be appointed to the joint board by each city and the length of the commissioners' terms. A majority of the commissioners is a quorum. A joint board of

commissioners that is created under this paragraph to govern a joint police department is subject to the provisions of subs. (3) to (7n), a joint board of commissioners that is created under this paragraph to govern a joint fire department is subject to the provisions of subs. (8) to (12) and a joint board of commissioners that is created under this paragraph to govern a joint police and fire department is subject to the provisions of subs. (2) to (12).

(3) Chiefs. The board shall appoint the chief of police and the chief of the fire department, who shall hold their offices during good behavior, subject to suspension or remove by the board for cause.

(4) Subordinates. (a) The chiefs shall appoint subordinates subject to approval by the board. Such appointments shall be made by promotion when this can be done with advantage, otherwise from an eligible list provided by examination and approval by the board and kept on file with the clerk.

(b) Any person who, on June 23, 1943 has served and acted as a full-time city police patrolman, patrolwoman or police officer performing the services by virtue of regular assignment therefor under the orders and supervision of the chief of police of said city, and receiving his or her salary on the regular official payroll of said police department for a continuous period of more than 10 years, although not regularly appointed from an eligible list, is deemed to have been regularly appointed, as of the time of the commencement of his or her service.

(c) For the choosing of such list the board shall adopt, and may repeal or modify, rules calculated to secure the best service in the departments. These rules shall provide for examination of physical and educational qualifications and experience, and may provide such competitive examinations as the board shall determine, and for the classification of positions with special examination for each class. The board shall print and distribute the rules and all changes in them, at city expense.

(d) The examination shall be free for all U.S. citizens over 18 and under 55 years of age, with proper limitations as to residence, health and, subject to ss. 111.321, 111.322 and 111.335, arrest and conviction record. The examination, including minimum training and experience requirements, shall

be job-related in compliance with appropriate validation standards and shall be subject to the approval of the board and may include tests of manual skill and physical strength. All relevant experience, whether paid or unpaid, shall satisfy experience requirements. The board shall control examinations and may designate and change examiners, who may or may not be otherwise in the official service of the city, and whose compensation shall be fixed by the board and paid by the city. Veterans and their spouses shall be given preference points in accordance with s. 230.16(7).

(e) The council of any city of the 2nd, 3rd or 4th class may provide that members of the police force shall be of both sexes. The fire and police commission shall select each police officer from an eligible list.

(5) Disciplinary actions against subordinates. (a) A subordinate may be suspended as hereinafter provided as a penalty. The subordinate may also be suspended by the commission pending the disposition of charges filed against the subordinate.

(b) Charges may be filed against a subordinate by the chief, by a member of the board, by the board as a body, or by any aggrieved person. Such charges shall be in writing and shall be filed with the president of the board. Pending disposition of such charges, the board or chief may suspend such subordinate.

(c) A subordinate may be suspended for just cause, as described in par. (em), by the chief or the board as a penalty. The chief shall file a report of such suspension with the commission immediately upon issuing the suspension. No hearing on such suspension shall be held unless requested by the suspended subordinate. If the subordinate suspended by the chief requests a hearing before the board, the chief shall be required to file charges with the board upon which such suspension was based.

(d) Following the filing of charges in any case, a copy thereof shall be served upon the person charged. The board shall set date for hearing not less than 10 days nor more than 30 days following service of charges. The hearing on the charges shall be public, and both the accused and the complainant may be represented by an attorney and may compel the attendance of witnesses by subpoenas which shall be issued by the

president of the board on request and be served as are subpoenas under ch. 885.

(e) If the board determines that the charges are not sustained, the accused, if suspended, shall be immediately reinstated and all lost pay restored. If the board determines that the charges are sustained, the accused, by order of the board, may be suspended or reduced in rank, or suspended and reduced in rank, or removed, as the good of the service may require.

(em) No subordinate may be suspended, reduced in rank, suspended and reduced in rank, or removed by the board under par. (e), based on charges filed by the board, members of the board, an aggrieved person or the chief under par. (b), unless the board determines whether there is just cause, as described in this paragraph, to sustain the charges. In making its determination, the board shall apply the following standards, to the extent applicable:

1. Whether the subordinate could reasonably be expected to have had knowledge of the probable consequences of the alleged conduct.

2. Whether the rule or order that the subordinate allegedly violated is reasonable.

3. Whether the chief, before filing the charge against the subordinate, made a reasonable effort to discover whether the subordinate did in fact violate a rule or order.

4. Whether the effort described under subd. 3 was fair and objective.

5. Whether the chief discovered substantial evidence that the subordinate violated the rule or order as described in the charges filed against the subordinate.

6. Whether the chief is applying the rule or order fairly and without discrimination against the subordinate.

7. Whether the proposed discipline reasonably relates to the seriousness of the alleged violation and to the subordinate's record of service with the chief's department.

(f) Findings and determinations hereunder and orders of suspension, reduction, suspension and reduction, or removal, shall be in writing and, if they follow a hearing, shall be filed within 3 days thereof with the secretary of the board.

(g) Further rules for the administration of this subsection may be made by the board.

(h) No person shall be deprived of compensation while suspended pending disposition of charges.

(i) Any person suspended, reduced, suspended and reduced, or removed by the board may appeal from the order of the board to the circuit court by serving written notice of the appeal on the secretary of the board within 10 days after the order is filed. Within 5 days after receiving written notice of the appeal, the board shall certify to the clerk of the circuit court the record of the proceedings, including all documents, testimony and minutes. The action shall then be at issue and shall have precedence over any other cause of a different nature pending in the court, which shall always be open to the trial thereof. The court shall upon application of the accused or of the board fix a date of trial, which shall not be later than 15 days after such application except by agreement. The trial shall be by the court and upon the return of the board, except that the court may require further return or the taking and return of further evidence by the board. The question to be determined by the court shall be: Upon the evidence is there just cause, as described under par. (em), to sustain the charges against the accused? No costs shall be allowed either party and the clerk's fees shall be paid by the city. If the order of the board is reversed, the accused shall be forthwith reinstated and entitled to pay as though in continuous service. If the order of the board is sustained it shall be final and conclusive.

(j) The provisions of pars. (a) to (i) shall apply to disciplinary actions against the chiefs where applicable. In addition thereto, the board may suspend a chief pending disposition of charges filed by the board or by the mayor of the city.

(5m) Dismissals and reemployment. (a) When it becomes necessary, because of need for economy, lack of work or funds, or for other just causes, to reduce the number of subordinates, the emergency, special, temporary, part-time, or provisional subordinates, if any, shall be dismissed first, and thereafter subordinates shall be dismissed in the order of the shortest length of service in the department, provided that, in cities where a record of service rating has been established prior to January 1, 1933, for the said subordinates, the emergency, special, temporary, part-time provisional subordinates, if any,

shall be dismissed first, and thereafter subordinates shall be dismissed in the order of the least efficient as shown by the said service rating.

(b) When it becomes necessary for such reasons to reduce the number of subordinates in the higher positions or offices, or to abolish any higher positions or offices in the department, the subordinate or subordinates affected thereby, shall be placed in a position or office in the department less responsible according to the subordinate's efficiency and length of service in the department.

(c) The name of a subordinate dismissed for any just cause set forth in this section shall be left on an eligible reemployment list for a period of 2 years after the date of dismissal, except that if the dismissal was for disciplinary reasons the subordinate may not be left on an eligible reemployment list. If any vacancy occurs, or if the number of subordinates is increased, in the department, the vacancy or new positions shall be filled by persons on the eligible reemployment list in the inverse order of the dismissal of the persons on the list.

(6) Optional powers of board. (a) The board of fire and police commissioners shall have the further power:

1. To organize and supervise the fire and police departments and to prescribe rules and regulations for their control and management.

2. To contract for and purchase all necessary apparatus and supplies for the use of the departments under their supervision, exclusive of the erection and control of the police and fire station buildings.

3. To audit all bills, claims and expenses of the fire and police departments before the same are paid by the city treasurer.

(b) The provisions of this subsection shall apply only if adopted by the electors. Whenever not less than 30 days prior to a regular city election a petition therefor, conforming to the requirements of s. 8.40 and signed by electors equal in number to not less than 20% of the total vote cast in the city for governor at the last general election, shall be filed with the clerk, the clerk shall give notice in the manner of notice of the regular city election of a referendum on the adoption of this

subsection. Such referendum election shall be held with the regular city election, and the ballots shall conform with the provisions of ss. 5.64(2) and 10.02, and the question shall be "Shall s. 62.13(6) of the statutes be adopted?"

BEFORE THE BOARD OF POLICE AND FIRE
COMMISSIONERS
OF THE CITY OF MADISON

Debra H. Amesqua,
Complainant

vs.

Firefighter Ronnie B. Greer,
Respondent

FIREFIGHTER RONNIE B. GREER: OFFER OF PROOF

I, Ronnie B. Greer, being duly sworn, depose and state the following in answer to the questions posed, for use in lieu of sworn testimony as an offer of proof in the above entitled proceedings.

1. What was the basis of your statement that recruit Cato was "fired"?

Candidates who apply and are accepted for training enter a training period of 12 weeks. Those candidates are hired by the Department and become Department employees beginning the first day of training. They are on Department payroll and are treated as employees like any other occupation.

It was common knowledge and undisputed that Recruit Cato was terminated four days prior to completing his training period. His termination was involuntary, and the term "fired" is a term commonly used in the department in reference to terminating recruits and is an accurate description of the department's decision to terminate a candidate during or after training.

2. What was the basis of your statement that Holtz "shoved and screamed" at Cato?

The videotape shows plainly what happened. My view of Holtz's actions on the tape was exactly the same as that of Lt. Joe Conway who stated in his letter to Amesqua dated 11/12/96, Exh. 24, "I have interviewed the recruit who was the victim of D/C Holtz's *physical and verbal assault*, I have also talked with other recruits, I believe this is not an isolated incident." Conway further stated that "D/C Holtz must be treated like any other member of this fire department who has violated the rules and regulations in a most *violent and unbecoming* way." (Emphases added.)

Further, reporter Scott Russell viewed Holtz's actions the same way. In his article in the Capital Times dated May 1, 1997, he stated, "The question was wether Holtz, 'the training supervisor,' used improper force when she *yelled at and shoved* a recruit during a live fire exercise. A video of the incident was aired on a local television station." (Emphasis added.)

Even Holtz herself stated that "I have never taken such extraordinary measures to control a situation. I did not feel comfortable with what I consider the extent of interaction that I had with Recruit Cato." Exh. 13:20. Chief Amesqua agreed with Holtz's "own admission." Exh. 2.

My basis for concluding that Holtz shoved and screamed at Cato was the same as that of Conway and Russell. I agree with the conclusion of Holtz and Amesqua that I have never seen anything so extreme and "extraordinary" in my 17 years of firefighting.

3. What was the basis of your questioning "Chief Amesqua's conclusion that the 'questionable measures' (shoving & screaming) used by Chief Holtz were not 'unreasonable', and that she simply 'needs further guidance and training'"?

Amesqua stated that "based on your own [Holtz's] admission, you state that 'you have never taken such

extraordinary measures to control a situation'." Exh. 2. Amesqua further warned, "I caution you that any future use of such measures will be promptly investigated: and to the extent that they are found to be unreasonable or contrary to department standards the conduct may result in discipline up to and including discharge." Exh. 2.

Clearly, *everyone* including the Department administration found Holtz's actions sufficiently "questionable" that a serious investigation was required. My assessment of the videotape was also that Holtz's actions were questionable.

As to Amesqua's conclusions themselves, Local 311 had already received a copy of the Chief's statement, Exh. 2, and I was merely quoting from the statement. Exh. 2, 52:10.

As to the *merits* of Amesqua's conclusions, Holtz's problem is *not* her need for "further guidance and training" but rather a fundamental personality problem. Marcia Holtz has frequently lost her temper and self-control in the past and has screamed at, berated, intimidated and threatened other members of the Department. Holtz's conduct with Cato was not an isolated or exceptional incident.

I personally witnessed an incident involving Holtz and Firefighter Catherine Jackson, day of shooting on Simpson Street while I was at the Community Center. Station No. 6 responded to the scene. Jackson was pumping and Marcia began screaming at her about getting the pump in gear. Holtz "lost it" and was out of control.

Jackson talked to me a number of times about that situation and other incidents in which Holtz has abused her and asked me for advice about what to do and about working somewhere else. I attempted to convince her to file a complaint, but she was afraid of retaliation and decided not to.

Firefighter Dave Peterson was working at No. 6 and Holtz was officer there. Peterson told me that during a response in which he participated, Holtz had "lost it" with him and that he

didn't understand why. This incident was related to me in the presence of other firefighters while I was visiting No. 6 as inspector.

I was also told by former Firefighter Pam Schmidt that Holtz harassed her while she was engaged in routine station cleaning duties. Schmidt also stated that Holtz "lost it" and berated her about the way she interacted with male firefighters.

During my experience as firefighter and inspector over a number of years, I have heard numerous complaints from crews at Nos. 1 and 6 where Marcia was officer that she has lost her temper without justification in many situations.

In his letter to Amesqua dated 11/12/96, Exh. 24, Lt. Joe Conway also stated, "I have interviewed the recruit who was the victim of D/C Holtz's physical and verbal assault, I have also talked with other recruits, *I believe this is not an isolated incident*."

Subsequent to the commencement of these hearings, three other recruits did complain against Holtz for similar conduct. Holtz was ordered to have no contact with recruit during that investigation and, I understand, is no longer training chief.

4. What was the basis of your statement that the "advance leadership class" is a "training program which is coveted by other chief officers to the extent that there is a 'waiting list' to get in"?

During a conversation among Chief Joe Aldworth, me and part of my crew, Aldworth told us that the other chief officers were "p---ed off" because Amesqua had recommended Holtz for leadership training school at the National Fire Academy in Emmitsburg, Maryland. She was the least senior chief officer, and the other officers were on a waiting list to go. (The term "waiting list" may have been an informal description of the fact that many other officers were waiting to go for such training rather than a reference to an actual formal written list.)

The other officers believed that Holtz's attendance at the class would give her an advantage over the more senior officers and, because Holtz was Amesqua's appointee, it looked like a ploy to move Holtz ahead of them. Later on, Lt. Yapp or one of the other officers said that Chief Bavery had said basically the same thing.

Executive development classes are training courses in management held at the National Fire Academy in Emmitsburg. Based on statements of chief officers, it is my understanding that admission to those classes is possible only by recommendation of departmental chiefs. In issuing the News Release, I did not have any particular officer in mind, but was aware from my conversations with Aldworth and Yapp that the other chief officers generally resented Amesqua's recommending Holtz to the Academy.

5. What was the basis for your statement that Chief Holtz "appears to have suggested" the 6 month extension of her probationary period?

Local 311 had received a copy of the Chief's statement, Exh. 2, and I was merely referencing Amesqua's decision which states, "In fact you volunteered that you would benefit from an extension of your probationary period." Exh. 2.

6. What was the basis for your statement, "Now this would be laughable [if] it were not such a serious matter"?

Disparity between "action and reaction" or between other kinds of related events is often humorous. Seneca's famous quote is an example of such humor, "The mountains have labored and brought forth a mouse."

However, a command officer verbally and physically abusing a new recruit whom she is supposed to be training and guiding is an *extremely* serious incident. Throughout my career, the Department has interpreted Mayor's Administrative Procedure Memorandum No. 2-25 as a "zero tolerance policy" against striking or physically abusing other employees. It has

always been understood that violation of that APM would result certain termination.

Although disparity may be humorous in other situations, Amesqua's "non-response" in this situation to Holtz's offense warranting termination is *not* "laughable." The News Release emphasized the disparity between Holtz's serious rule violation and Amesqua's virtual non-response and communicates that, in this case, such disparity is *not* laughable.

7. What was the basis for your statement that "A senior officer in essence, physically and verbally assaults and employee."

Again the videotape shows what happened. As with the other comments, my view of Holtz's actions on the video tape was exactly the same as that of Lt. Joe Conway who stated in his letter to Amesqua dated 11/12/96, Exh. 24, "I have interviewed the recruit who was the victim of D/C Holtz's *physical and verbal assault*, I have also talked with other recruits, I believe this is not an isolated incident." Conway further stated that "D/C Holtz must be treated like any other member of this fire department who has violated the rules and regulations in a most *violent and unbecoming* way."

Further, reporter Scott Russell assessed Holtz' actions exactly the same way. In his article in the Capital Times dated May 1, 1997, he stated, "The question was wether Holtz, 'the training supervisor,' used improper force when she *yelled at and shoved* a recruit during a live fire exercise. A video of the incident was aired on a local television station." (Emphasis added.)

Even Holtz herself stated that "I have never taken such extraordinary measures to control a situation. I did not feel comfortable with what I consider the extent of interaction that I had with Recruit Cato." Exh. 13:20. Chief Amesqua agreed with Holtz's "own admission." Exh. 2.

My basis for concluding that Holtz shoved and screamed at Cato was the same as that of Conway and Russell. I agree with

the conclusion of Holtz and Amesqua that I have never seen anything so extreme and "extraordinary" in my 17 years of firefighting.

8. What was the basis for your questioning Amesqua's conclusion that Holtz's "screaming was 'professional in content and germane'?'

Madison Fire Department Rule 17 requires that "Members must at all times exercise due care toward all members of the Department . . . ." Exh. 41. As stated by Chief Saxe, Exh. 58, this Rule refers to "physical due care." Holtz clearly did not exercise physical due care toward Cato.

Madison Fire Department Rule 18 imposes the following requirement upon all members of the Department: "In their demeanor to the associates on the Force, they shall be courteous and considerate." Holtz's treatment of Cato was gratuitous and unnecessary, and demeaning, insulting and degrading.

Holtz clearly violated Mayors Administrative Procedure Memorandum No. 2-25, "Workplace Violence Prevention and Response Policy," and the Department's "zero tolerance" policy against physical abuse.

Additional reasons for questioning Amesqua's conclusion are contained in my statements throughout this Offer of Proof.

9. What was the basis for your statement, "In over 17 years of firefighting with both experienced and non-experience[d] firefighters, I don't believe I've ever seen a situation where it was necessary to physically assault anyone to get their attention or to instruct them. Granted it is often necessary to make physical contact in a fire situation to in[i]tiate communication with another firefighter, but never to the extent we have seen in this incident."

Amesqua concluded in Exh. 2 that the purposes of Holtz's actions were (a) "stopping the advancement of a[n] inexperienced fire recruit" into "a live fire scenario without the

established safety practice of staying with one's crew" and (b) to "emphasize the importance of the training lesson" of "teamwork and staying with one's crew."

As to the first purpose of "stopping" Cato, I have fought fires and been involved in recruit training for over 17 years -- longer than Chief Amesqua herself has been in the fire service. I have been involved in literally hundreds of fire situations and other emergencies. I have *never* seen a situation where actions like those of Chief Holtz were even *remotely* necessary to stop another firefighter from advancing. I also agree with the Offer of Proof of Chief George Friedell submitted in this case.

As to the second purpose of instructing Cato, it is hard to imagine demeanor that could be more counterproductive to good instruction than that displayed by Holtz. In my experience as a firefighter, fear and intimidation do not benefit a new recruit, they actually disorient and distract the recruit from concentrating on the task and procedures in which he has been trained.

My belief that Holtz's actions were unprecedented is confirmed by statements of Amesqua and Holtz themselves. Amesqua found that "based on your own [Holtz's] admission, you state that 'you have *never* taken such *extraordinary* measures to control a situation." Exh. 2. I agree that Holtz's actions were extraordinary and unprecedented during my tenure with the Madison Fire Department.

10. What is the basis for your statement, "I said in October that this matter would be 'down played,' 'swept over' and 'nothing significant' would be done about it. A lot of my fellow firefighters doubted my 'prediction'."

Because Holtz's actions were so extraordinary, the incident was the subject of exceptional discussions in the firehouses among virtually all crews including mine. Many of my crew members believed that Chief Amesqua was in a position where she would be forced to impose serious discipline against Holtz including termination and that the PFC would sustain that

decisions. I told them that I did not believe anything significant would be done.

The political and personal stakes in this situation were tremendous. Amesqua was a trustee and officer of Women in the Fires Service, and Holtz was also a long-time member. Amesqua, by her own admission, clearly came to the department with the intent to advance women into command positions. This view was widely held among members of the department including chief officers. A finding of physical abuse warranting demotion or termination would have been a serious and unacceptable setback to Amesqua's objective of advancing women.

Holtz was also Amesqua's very first appointment to a command position. Because Amesqua's duties included evaluation of Holtz's fitness to serve in a command position, any finding that Holtz was unfit or had engaged in serious rule violations would reflect negatively on Amesqua's own judgment and competence as chief which had already been questioned by many firefighters. (Even now, Local 311 has scheduled an unprecedented vote of no-confidence in Chief Amesqua.)

Amesqua was hired initially under an exceptional cloud of dispute whether she was qualified and whether the Police and Fire Commission had engaged in an "affirmative action" hiring. I was obviously aware of the extensive press coverage. The PFC was also being investigated by the Equal Rights Division pursuant to Chief Phil Vorlander's complaint that it had illegally discriminated against him on the basis of sexual orientation when it hired Amesqua and rejected him for the chief's position. Amesqua's appointment also had received vocal, public support from the Madison homosexual community. Consequently, both Amesqua and the PFC had a great deal on the line in affirming the validity of Amesqua's appointment. (Exhs. 61, 62, 63, 64, 72, 77, 78, 79, 80, 81.)

For these reasons, it was obvious to me that Amesqua would do nothing significant and that the PFC would accept

Amesqua's disposition.

11. What is the basis for your statement, "Well, time has 'told the story'. One does not need to be a prophet, just someone willing to see things as they are."

I used the term "prophet" in the same sense that Chief Earle Roberts "predicted" in February, 1995 that Amesqua would succeed him as Chief of the Madison Fire Department. According to the Wisconsin State Journal, 12/19/95, "Departing Chief Blasts Hiring Process,"

> Last February, Madison Fire Chief Earle Roberts put in an envelope the name and picture of the person he thought would replace him, sealed it and gave it to Madison Mayor Paul Soglin.
>
> On Friday, Soglin opened the envelope and was surprised to find the name and picture of Debra Amesqua . . . . Madison's Police and Fire Commission voted unanimously Friday to name Amesqua the city's fire chief.
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> "I saw the name and *I was quite stunned by his ability to predict*," Soglin said Monday.
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> Roberts said Phoenix Assistant Fire Chief Dennis Compton told him in October, 1994 that Amesqua, then an assistant fire chief in Tallahassee, Fla., was in line to replace him. Roberts said he then learned that Amesqua had been told of the pending Madison vacancy.
>
> That convinced him, Roberts said, that Amesqua was the preferred candidate for the job before the official search began. The PFC placed its first advertisement for the vacancy in April 1995.
>
> "It's got to be the most rotten process I've seen in 42 years of firefighting," said Roberts, who supported his assistant chief, Phil Vorlander, for the job. "They knew from the beginning what they wanted to do."

Obviously there were differences of opinion about Amesqua's appointment. Some believe that the process was fair an open. However, Roberts clearly believed that Amesqua's selection was pre-determined and publicly expressed his opinion *while still chief.*

Similarly, I believed that Amesqua's decision in this case was very predictable and said so immediately following the incident -- just as Roberts "predicted" his successor months before the replacement process even formally began. As did Roberts, I merely expressed my opinion about what seemed obvious and, just as in Robert's situation, events proved my prediciton right.

12. What is the basis for your statement that "it would be only proper to have that investigation done by an independent, disinterested part."

My view of the need for an independent investigation is exactly the same as that of that of Lt. Joe Conway and Local 311 who asked for an independent investigation in his letter to Amesqua dated 11/12/96, which states, "I am asking that she [Holtz] be relieved of her duties in accordance with Wisconsin State Statute 62.13, *pending a complete investigation by the City Attorney's office*." Exh. 6 also states, "The union asked Amesqua, unsuccessfully, for an independent investigation of the matter."

13. What is the basis for your statement that the investigating officer [Chief Spohn] could have been "unduly influenced" because he was a "subordinate to Chief Amesqua and a staff member with Division Chief Holtz."

I know Spohn personally and know that he has ambition to advance through the ranks. There is nothing wrong with that. However, advancement through the ranks is extremely competitive and depends in large part on the evaluation of superior officers under whom one serves.

Obviously, like any other person, Spohn could be affected by what he thought Amesqua wanted to hear since she is in a position to thwart his advancement. I do not know whether he was actually biased. However, preventing the *possibility* of actual or apparent bias is very important to Department and the careers of its personnel, so I believe it was important to ask the question whether an independent investigation was warranted. As I said at the predetermination hearing,

A It's just a question, whether or not there could be influence or the fact that he's subordinate to the chief and may realize that an unfavorable decision or something in the case may, in fact, cause some repercussions of the individual in the investigation. That's reasonable to -- that's a reasonable question to ask, I think, given the circumstances.

Q Do you believe the investigating officer was unduly influenced? Chief Spohn?

A Well, I'm not sure. I'm it's a question in my mind. Me, personally, I could, I could, I don't think that's unreasonable to, to think that may happen. I don't think it's an --

Q So you believe it could happen, but at this point you're not sure?

A Oh, I knew it could happen. Whether it happened in this case, I'm not sure, I don't know. I don't think it's unreasonable to, to think it would happen.

Q If you believe it could happen, how do you believe it could happen?

A (Laughs.)

Q And I believe, I think you answered that back with No. 21, you said "He's subordinate to the chief."

A Right. Subordinate to the chief and was given instruction of the Department, previous history, we're all, human nature, it's not unreasonable at all to, to think that. Or to see it happen.

Which is why, I think, in most cases you see if you want to avoid the appearance of anything wrong, you have an independent counsel do an investigation or an independent person do an investigation who'd have no,

have no interest in it, the proceeding, or no visible threat in the proceedings. I mean it's just, it's common sense. Exh. 52:12.

14. It is possible that the "conclusions of the investigation [could have been] simply disregarded without opposition by that subordinate."

The Department itself reviewed extensively the need for an independent investigation. Chief Spohn himself concluded,

> After consultation with Captain Richard Cowen (West Precinct) and Lieutenant Patrick Malloy (Professional Standards) of the Madison Police Department on Wednesday, November 13, 1996, and after careful consideration, it is my recommendation that the following actions be considered:
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> 3. That the investigation of this matter be conducted by Madison Fire Department personnel, and not by the City Attorney's office as suggested by President Joseph Conway, Firefighters Local 311 president. Exh. 3.

It is remarkable that Amesqua is attempting to fire me for questioning whether an independent investigation was warranted, when the Department itself obviously concluded there was good reason to ask the same question and sought an independent opinion on it from the Police Department.

It also seems questionable that the very person (Spohn) who made the recommendation to have an internal investigation conducted that investigation himself. Obviously, he would have an interest in conducting the investigation in such a way that his original decision to do an internal investigation would not come under scrutiny.

15. The relationship between Chief Amesqua and Chief Holtz goes back a ways, namely through their affiliation

with an organization called "Women in Fire."

The name of the organization is actually "Women in the Fire Service, Inc." Originally, the organization was named "Women in Fire Suppression." Amesqua is a trustee and vice-president of the organization. Exh. 40:9. Holtz has also been a member since about the time she began her career with the Department in 1982. Exh. 40:36.

Holtz and I came on together in 1982. We have talked many times since then, and her friendship and acquaintance with Amesqua through that organization has come up in conversation on several occasions after Amesqua was being considered for the chief's position.

16. What is the basis for your statement that Women in the Fire Service is "seen by most" firefighters in this area as a predominantly homosexual organization"?

That statement is merely an observation that most firefighters in the Madison Fire Department view Women in the Fire Service as having a proportionately large number of homosexuals in leadership positions. I believe this perception may be due in part to the facts that Women in the Fire Service is headquartered in Madison, its executive director and Holtz openly maintain a homosexual relationship, and vice-president and trustee Amesqua is generally believed to be homosexual as well.

WFS is also viewed as an organization that takes aggressive positions supporting homosexuals. For Example, WFS sent a letter to the Senate Armed Services Committee and to all women Senators and Representatives in Congress regarding women in the military.

> On behalf of Women in the Fire Service, a national organization of women firefighters, I am writing to urge you to stop discrimination against lesbians and gay men in the U.S. armed forces.
>
> . . . .

. . . .

. . . .

Approximately 20-25% of women firefighters are lesbian or bisexual. Where gay and lesbian firefighters receive equal protection under state laws or local ordinances, they are able to be "out" on the job and function effectively. Readiness, efficiency, and teamwork of firefighting crews are unimpaired. Women who are openly lesbian have been promoted to lieutenant, captain, and battalion chief positions, serving with distinction and earning the respect of their co-workers. Where equal protection is lacking, many lesbian and gay male firefighters are forced to keep their sexual identify a secret for fear of losing their jobs; those who are honest and open about who they are have often been subjected to harassment.

The focus of attention concerning gays in the military has been almost exclusively on how heterosexual men react to, and interact with, homosexual men. The impact of the current ban, however, falls most heavily on women. While women comprise 10% of personnel in the armed forces, they account for 23% of dismissals due to homosexuality. This not only affects lesbians, but also heterosexual women. Studies of sexual harassment in the military have repeatedly shown that allegations of "lesbianism" are commonly used to silence, intimidate, and retaliate against heterosexual women who complain about men's sexual harassment.

. . .

. . .

. . .

Lesbian and gay men must be allowed to continue to serve in the military, and to state their sexual identity openly, if that is their choice, without penalty. I urge you to vote to repeal the ban on homosexuals in the U.S. military and refocus your efforts instead on assuring fair and equal treatment for all who serve. Exh.40:4, 16 - 17.

My News Release takes absolutely no position on homosexuality, and contains nothing derogatory whatever about

homosexuals, as Amesqua herself admitted during the PFC hearing. The News Release merely observes that "most firefighters in the area" view WFS in this way.

17. What is the basis for your questioning whether Amesqua showed favoritism to a "fellow member" or "possible friend."

As I stated in answer to Question 15, I was aware that both were members of Women in the Fire Service and, based on conversations and personal observation, believed they considered each other as a friend.

18. What was the basis of your statement that Holtz and Amesqua are homosexual women?

I came on with Holtz and have worked with her for years. She has stated openly to others and directly to me that she is homosexual. She has had bumper stickers on her car declaring her orientation. Her long time partner is Terry Floren, executive director of Women in the Fire Service, Inc. Exh. 40:36:6. Among firefighters in the department, she and Floren have been open about their relationship.

Prior to Amesqua's hiring, personnel chief Fred Kinney met with my crew and expressed his own opinion that she probably was homosexual. That topic, and whether it would influence her hiring by the PFC were topics of frequent conversations among crews prior to her hiring. I also talked with a member of the Tallahassee Fire Department who expressed the same belief.

Virtually every member of the Department believed then and still believes that she is homosexual. I have been told by a number of different individuals both in and out of the Department that she has a partner and that they were considering buying a house together in Madison.

Vorlander and his attorney filed complaints with the Equal Rights Division and in federal court alleging that Amesqua was granted favorable treatment on the basis of her sexual

orientation. They have frequently repeated these statements in the media, specifically stating that they are not alleging that there is anything inappropriate about her being homosexual, but that she received favorable treatment on that basis and that Vorlander was discriminated against because of his heterosexual orientation. Exh. 72.

19. What is the basis for your statement, "Both are seen by many has having clear agendas as it concerns women in the fire service"?

Many in the department believed that Amesqua clearly came to the Department with an agenda to promote women through the ranks. Amesqua is a trustee and vice-president of Women in the Fire Service. Both Amesqua and Women in the Fire Service acknowledge their objectives.

In the August, 1994 issue of *Firework*, Amesqua provided "candidate information" for WFS members in the WFS trustee election.

> I openly promote, recruit and train qualified candidates with a focus on diversity appreciation and creative problem resolution.
>
> As a candidate for a trustee position with Women in the Fire Service, I will be dedicated to the management development and growth of upwardly progressive women fire officers across the nation. Exh. 40:83:6.

Amesqua was elected. An earlier issue of *WFS Quarterly* described the trustee's duties:

> Trustees are responsible for setting goals and policies for the organization and establishing fundraising plans. They are the primary representatives of WFS to the fire service community and the world at large, and they must be knowledgeable about the history and purpose of our organization as well as committed to promoting. Exh. 40:1:18.

The Spring, 1996 issue of *WFS Quarterly* also carried an article on Amesqua's investiture as Madison's fire chief. It stated,

> WFS congratulates Chief Amesqua on her appointment and wishes her success in managing the challenges of her new position. We also look forward to a positive working relationship between WFS and the fire department of the city where we have our headquarters. Exh. 40:11:8.

There is nothing wrong with forming professional support organizations such as Women in the Fire Service. However, problems arise if individual or group objectives in relation to that organization interfere with operation of the department. For example, the Wisconsin State Journal reported,

> It's a big relief that she is gone now," said union president Reggie Brown. Brown said Amesqua sometimes has trouble getting along with people and listening to others.
>
> *He said her advocacy for women firefighters sometimes pitted her against men in the department.* Exh. 64

Obviously, Brown had worked with Amesqua and was in a position to know. I personally talked to a firefighter in the Tallahassee union who expressed the same opinion. That individual stated that Amesqua had an "attitude" toward men, and mentioned as an example a controversial discipline measure involving menial labor which Amesqua imposed against a black firefighter and which other firefighters viewed as deliberately demeaning. I also talked to the department chief in Tallahassee who acknowledged that those the complaints and controversy existed.

Within months of Amesqua's taking command, a number of command officers retired, resigned or took positions in other cities. Consistent with her stated intent, Amesqua appointed Holtz to the position of training chief.

Amesqua also attempted to reorient the Department training program with a new program called Values Enhanced Recruit Training, or VERT. Amesqua's stated purpose was to move beyond traditional "skills" training to training designed to change social "attitudes" and "viewpoints." She actually attempted to subcontract this training to Women in the Fire Service. When she met resistance, she appointed Holtz training commander who shared similar views.

Amesqua's objectives of advancing women in the fire service and imposing "values" training have been topics of frequent discussion among department members. It is reasonable to question whether Holtz's support of those objectives made Amesqua reluctant to remove Holtz from her position or impose sanctions for the Cato incident.

20. What is the basis for your questioning whether Amesqua's "radical agendas" affected her decision in the Cato incident.

To reorient the nature of departmental training as Amesqua attempted is, indeed, radical. In an interview with Women in the Fire Service published in the WFS Quarterly, Winter, 1996, Amesqua discussed further radical changes which she advocates, including radical changes to the existing department command structure.

> WFS:. . . [C]ould you talk in general about education and about how one should groom oneself for a fire service leadership position?
> DA: First of all, you have to decide what you want as an outcome of your career. Then get in touch with the cutting edge of new thinking. Leaders of the future have to have new ideas. Learn to think creatively. Practice talking about *radical* ideas. Read magazines that support this kind of thinking . . . .
>
> . . . .
>
> We're going to have to re-engineer the fire service. You don't do this by locking yourself into traditional thinking. We need *radical*, creative thinking. There's

> going to be a lot of pain in city governments as we face budget cuts, cuts in staffing. As fire service executives, we're the ones who will be implementing these changes and making them happen. So we have to rethink how we organize the fire department, to make the most effective use of the dollars we have.
>
> *I think the hierarchy of the fire service is going to disappear. Fire department personnel will become multi-dimensional employees of the city, not just the fire department.* Radical cuts in budgets will drive this kind of change. Exh. 40:10, pp. 3 - 4. (Emphases added.)

Amesqua herself has characterized her views as "radical." It is not unreasonable to believe that she would appoint other officers such as Holtz who share views and organizational goals similar to her own. It is also reasonable to question whether her interest in advancing what she describes as radical changes would make her more reluctant to dismiss officers such as Holtz whom she has appointed as a means to implement those views and goals.

Based on personal conversations with Holtz over the years and public statements by her to the media, the public, and members of the department, I am aware that Holtz holds viewpoints which are similar to those advanced by Amesqua and that she actively supports the changes Amesqua is seeking to implement.

21. What is the basis for your questioning whether Holtz's "violence" was "glossed over" or "rewarded"?

Amesqua made findings that Holtz's actions "were not unreasonable under the totality of the circumstances," that they were "professional in content and germane," and that they were "not protracted but concise and effective in stopping the advancement of a [sic] inexperienced recruit." Exh. 2.

The statements of Chief George Friedell and Lt. Clarence Williams presented in this case establish beyond question that Amesqua's decision ignored grave abuses and rule violations by

Holtz and that the six month extension of probation and recommendation to the NFA were inappropriate responses to her conduct when sanctions such as removal from command or discharge were warranted.

Amesqua did not acknowledge any wrongdoing whatsoever by Holtz. Further, she not failed to impose any actual sanction or suspension, she made a highly valued recommendation to the NFA on Holtz's behalf. It is therefore more than reasonable to question whether he decision "covered up" and "glossed over" Holtz's verbal and physical abuse of Cato.

22. What was your basis for stating that Amesqua's handling of the Cato incident looked like the "'good-ol-boy' system revived, repainted and given another name."

The term "good ol' boys" has been around for decades, and probably a lot longer than that. It is used frequently by blacks, women, and other minority groups to characterize the predominantly white, male groups which have traditionally controlled leadership positions. It is a *very* common term among firefighters, police officers, and other organizational employees to describe the organizational network and relationships among those in command positions and their friends and allies.

For example, the WFS Quarterly, Summer, 1989, contains a satirical letter signed by "Lt. W.E. Gottum Good Ole Boy F.D., Virginia." Exh. 40:1:20. The WFS Quarterly, Fall, 1995, openly accuses Chief Eddie Corral of the Houston Fire Department of engaging in the "good old boy" way of doing things." Exh. 40:8:10.

In Madison, minorities, women, union members, and other individuals outside the department command structure have for years publicly used the term "good ol' boys" in criticizing various department decisions, inability to advance with the department, and so on. See 78 for example. The department has *never* disciplined anyone for using that term in public criticism of a superior's decision -- until now.

23. What is the basis for your suggesting that the Department's action in your earlier case is disproportionately severe compared to its "wink[ing] at and reward[ing] physical assault" in the Holtz-Cato incident?

At the time I wrote the News Release, the Department was pursuing a three month unpaid suspension against me before the PFC on charges that I simply called personnel chief Fred Kinney a "phoney." In this case, Holtz physically and verbally abused a recruit, but received no discipline at all. The unequal treatment is obvious.

24. What is the basis for your suggesting that the Department's "letter of discipline" against another firefighter for making a remark about homosexuals at the fire station while "off duty" is disproportionately severe to the Department's disposition in the Holtz-Cato incident?

Firefighter Keith Wilke was off duty and stopped in at Station No. 10. He made a comment to the effect that he was tired of "faggots" shoving stuff down his throat. He did not make the comment directly to any homosexual. However, an officer in the station overheard the statement and reported the incident to the chief, who placed a letter of discipline in his file.

It is reasonable to ask why a mere derogatory slur not even made toward or in the presence of someone from the target group should receive a letter of discipline, yet Holtz did not receive any negative discipline for physically and verbally abusing Cato and later swearing and using a sexist slur with racial overtones against him. See Lt. Clarence Williams' Offer of Proof, Question 11.

25. What is the basis for your suggesting that the Department's "12 hour suspension" of an officer for angry comments to a delivery driver is disproportionately severe to the Department's disposition in the Holtz-Cato incident?

Lt. David Daggett was at Station No. 6 when a delivery driver from the local uniform company came by the station to make a delivery. The crew was apparently ready to leave, and the driver and Dagget had a dispute over having to wait to sign for the delivery. The driver reported to the administration that Daggett screamed and swore at him. Despite the fact that the driver had delivered uniforms for years and he and Daggett knew each other, the administration still imposed a 12 hour unpaid suspension.

Again, it is reasonable to ask why screaming or swearing at a non-employee acquaintance warrants a 12 hour unpaid suspension, yet Holtz did not receive any negative discipline for physically and verbally abusing Cato and later swearing and using a sexist slur with racial overtones against him.

26. What is the basis for your comments that if a white male chief officer had shoved and screamed at a female recruit, "Heads would have rolled"?

Given the department's well known "zero tolerance" policy for physical abuse, it has always been known and understood by all personnel (until the Cato incident) that any physical abuse of another member would result in termination or, at a minimum, demotion and severe sanctions. This has been an unwritten code of conduct among department personnel ever since I began my career with the department in 1980.

Further, when women and black firefighters came on with me in the early 1980's, the code of conduct changed regarding what was acceptable physical contact. In respect to women and minorities, it is been always understood that there are certain things that you "just don't do." It is clearly understood that white males can *never* control a woman or black through physical violence and that to do so would result in immediate and automatic termination.

27. To the extent that you have offered any opinions in this statement, what are your qualifications for rendering such opinions?

In addition to the experience cited in this statement and other hearing exhibits, my qualifications and background are contained in Exhibits 86 and 87.

28. Are the opinions expressed by you in this statement made to a reasonable degree of professional certainty in the firefighting profession?

Yes.

Dated this 22 day of May, 1998.

/s/ Ronnie B. Greer

State of Wisconsin)
)
County of Dane)

Personally came before me this 22 day of May, 1998, the above named Ronnie B. Greer, known to me to be the person who executed this instrument and acknowledged the same.

/s/
Frederick D. Cupelli

My Commission: 2-18-2000

3024 Packers Avenue Get all raw footage from Chanel TV

11/15/968:30 Chief Amesqua

10/3/96 Chief at Burn – Marcia informed the Chief of the occurrence at this time. Chief said she wanted to review the tape. Marcia brought the tape to Chief on 11/8/96. Chief showed L311 (Conway & Durengo) at 1630 11/08/96.

FIRE FIGHTERS LOCAL 311

INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS

821 Williamson St. * Madison, WI 53703 * (608)257-2030
FAX 257-1168

November 12, 1996

Chief Debra Amesqua
Madison Fire Department
325 W. Johnson
Madison WI 53703

Chief Amesqua:

Upon observing the actions displayed by Division chief Marcia Holtz in the November 5th Channel 15 video tape, I am asking that she be relieved of her duties in accordance with Wisconsin State Statute 62.13, pending a complete investigation by the City Attorney's office.

D/C Holtz's actions appear to be, at the least, in direct violation of the Rules and Regulations of the Madison Fire Department and the Mayor's Memorandum 3-29. Her volatile temper and loss of control presents a danger to the individuals she commands and supervises. The environment she has created in the most recent recruit class in one of fear, and fear of reprisal.

I have interviewed the recruit who was the victim of D/C Holtz's physical and verbal assault, I have also talked with other recruit, I believe this is not an isolated incident.

In order to provide a proper learning environment and a harassment free work environment, it is imperative that D/C Holtz be relieved of her duties immediately. D/C Holtz must be treated like any other member of this fire department who has violated the rules and regulations in a most violent and unbecoming way.

Sincerely,

/s/

Joe Conway, Jr.
President, IAFF Local 311

cc: Assistant Chief Fred Kinney
Hand Delivered 11/12/96

MADISON FIRE DEPARTMENT

325 W. JOHNSON ST. MADISON, WISCONSIN 53703-3295

DEBRA H. AMESQUA
FIRE CHIEF

TELEPHONE:608/266/4420
FAX: 608/267/1100
INTERNET:
Fire@ci.madison.wi.us

November 14, 1996

Joe Conway, Jr., President
Firefighters Local 311
821 Williamson St
Madison WI 53703

Dear President Conway:

This letter is in response to your letter of November 12, 1996 regarding Division Chief Marcia Holtz.

After discussions with the City Attorney and the Madison Police Department, it was decided that Division Chief Holtz will continue her present duties and an internal investigation will be conducted by Assistant Chief Bill Spohn. The facts of the investigation will be evaluated by Assistant Chief Fred Kinney and a recommendation will be made to me.

Please call me if you have any questions.

Sincerely,
/s/
Debra H. Amesqua
Fire Chief

DHA:FJK:ecl
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BEFORE THE BOARD OF POLICE AND FIRE COMMISSIONERS
OF THE CITY OF MADISON

Debra H. Amesqua,
Complainant

vs.

Firefighter Ronnie B. Greer,
Respondent

LT. JOSEPH M. CONWAY, JR. :
OFFER OF PROOF

I, Joseph M. Conway, Jr., being duly sworn, depose and state the following in answer to the questions posed, for use in lieu of sworn testimony as an offer of proof in the above entitled proceedings.

. . . .

. . . .

3. Identify the "other recruits" referenced in your letter to Chief Amesqua, Exh. 24, and describe the other incidents to which you referred.

One incident involved another recruit from Recruit Cato's class at Station No. 8. The recruit was involved in a mask drill and was on all fours. Chief Holtz grabbed the recruit's mask and pushed the recruit's face down against the floor. That incident was witnessed by Apparatus Engineer Tim Healy.

Another incident involved Recruit Terry Ritter from the previous recruit class. Chief Holtz lost her temper, yelled and screamed at him, then ordered him away, telling him that he was, "All done," meaning that she was going to fire him (even though she had no authority to do so). That incident was witnessed by another recruit named Joe Tiller.

Subsequent to these incidents, three female recruits from the most recent class came to me with concerns about Holtz's actions in yet another incident. There was an investigation for which Holtz received six hours' suspension and was removed from the training division.

. . . .

. . . .

5. Did the conduct of Chief Marcia Holtz as shown on the videotape, Exh. 12, violate policies of the City of Madison?

Mayors Administrative Procedure Memorandum No. 2-25, copy attached, provides

> Policy Statement: The City of Madison is committed to a safe work environment and to the safety and security of its employees. City managers and supervisors will work to the extent reasonably possible to ensure that employees are free from intimidating, threatening, and violent behavior while on duty. The City will not tolerate any on-duty intimidating, threatening or violent behavior on any City site against any City employee by: any employee . . . .
>
> City of Madison employees found to have engaged in intimidating, threatening or violent behavior while on duty will be subject to discipline, up to and including discharge for the first offense. . . . .
>
> It is the responsibility of City employees to report incidents of intimidating, threatening or violent behavior to their supervisors, their department of division head, the Human Resources Director or the City Attorney. It is the responsibility of City managers to investigate any such reports thoroughly and to take appropriate action according to this policy. There will be no retaliation against an employee who makes a good faith report of such behavior.
>
> "Intimidating or threatening" behavior is defined as words or actions which cause a person to avoid social

contact or to do or refrain from doing an act, including supervisory discipline, be inducing fear. That behavior includes words or actions which directly or indirectly show an apparent intent to cause physical or emotional harm to another person. That behavior includes words or actions that a reasonable person would believe to create a danger to a person's safety or property or to the property of the City.

APM 2-25 has been historically interpreted and applied as a "zero tolerance policy" against striking or physically abusing other employees. It has always been understood that violation of that APM would result in certain, severe sanctions including termination. It has also been interpreted and applied to prohibit verbally or emotionally harassing, intimidating, insulting, or demeaning another member of the Department.

Chief Holtz's verbal and physical abuse of Recruit Cato was a flagrant violation of APM 2-25.

6. Did the conduct of Chief Marcia Holtz as shown on the videotape, Exh. 12, violate Madison Fire Department work rules?

Rule 17 of the Madison Fire Department requires that "Members must at all times exercise due care toward all members of the Department . . . ." Exh. 41. As stated by Chief Saxe, Exh. 58, this Rule has been interpreted to require "physical due care." Chief Holtz verbal and physical abuse of Recruit Cato violated the requirement that she exercise physical due care toward him.

Rule 18 of the Madison Fire Department requires of MFD members that, "In their demeanor to the associates on the Force, they shall be courteous and considerate . . . ." Chief Holtz verbal and physical abuse of Recruit Cato violated the requirement that she be courteous and considerate toward him.

Rule 39 of the Madison Fire Department provides,

> Members must conform to and promptly and cheerfully obey all laws, ordinances, rules, regulations, and orders, wether general, special or verbal, when emanating from due authority. They shall be strictly on time to the minute, and obedience must be prompt, implicit, unqualified and unequivocal.

While the position of Local 311 is that Rule 39 is generally duplicative as applied, Chief Holtz's verbal and physical abuse of Recruit Cato violated the requirement that she comply with other applicable laws, rules, and regulations as the Madison Fire Department has historically attempted to interpret and apply Rule 39.

Chief Holtz' verbal and physical abuse of Recruit Cato was a flagrant violation MFD Rules 17, 18 and 39 as historically interpreted and applied by the Department.

. . . .

. . . .

Dated this 15th day of May, 1998.

/s/ J. Conway

State of Wisconsin)
)
County of Dane)

Personally came before me this 15th day of May, 1998, the above named Joseph M. Conway, Jr., known to me to be the person who executed this instrument and acknowledged the same.

/s/
Yvonne K. Knoche

My Commission: October 25, 1998

Work History and Educational Background

Joseph M. Conway, Jr.
821 Williamson St.
Madison, WI 53703

WORK EXPERIENCE:

1985 - Present Madison Fire Department. Madison, WI
Lieutenant 5/94
Firefighter/Paramedic 5/89
Firefighter 3/85
Provide fire, rescue and emergency medical services for the City of Madison Fire Department. Additional specialized training in hazardous materials, lake rescue and technical rescue.

1984 - 1985 Litwin Engineers. Houston, TX
Piping Designer
Designed, drafted and rectified field problems of the process piping systems for Amoco Oil Company at their Texas City Plant. Designed process piping modifications for Union Texas Petroleum's Ethylene plant in Geismer, LA.

1984 Applied Engineering. Orangeburg, SC
(Division of Fluor Engineers)
Piping Designer
Designed, drafted and modeled process piping systems of a $1.5 million modular frozen orange juice plant for Procter and Gamble.

1981 - 1984 Fluor Engineers. Houston, TX
Piping Designer
Designed, drafted and modeled process piping systems of multi-million dollar petrochemical plants for Phillips Petroleum and Texaco Oil Company. Area lead for five separate areas of the Texaco H-OIL project that accounted for $3.5 million of the project's costs.

1978 - 1980 Dane County Public Works

LTE Heavy Equipment Operator

Operated and maintained various types of heavy equipment, Caterpillar Loaders, Bulldozers, Earth Movers and Compactors at the County's Sanitary Landfill in Verona, WI.

CITY OF MADISON
INTER-DEPARTMENTAL
CORRESPONDENCE

To: Fire Chief Debra H. Amesqua
From: Assistant Chief William H. Spohn /s/
Subject: Division Chief Marcia Holtz Investigation
Date: December 17, 1996

On November 15, 1996, and November 19, 1996, I conducted interviews with nine Madison Fire Department personnel relative to the complaint against Division Chief Marcia Holtz involving Recruit Ron Cato. The following persons were interviewed with respect to this complaint:

Recruit Ronald Cato	Captain Gregg Knudtson
Recruit Samuel Hodo	Captain Ernesto Martinez
Recruit Paul Mason	Captain Rod Olson
Recruit Che Stedman	Captain Richard Willauer
Division Chief Marcia Holtz	

All interviews were audio taped and written transcriptions were produced from the audio tapes by Capitol City Reporters.

After reviewing the statements of those interviewed and after viewing the Channel 15 videotape of the incident, the following are my discoveries:

- That the Recruit class participated in one controlled training session involving fire prior to October 3, 1996. This session was held in the burn room of the burn tow3er at the Fire Service Education Center (MATC) in Madison, WI.

- That on October 3, 1996, the Recruit class participated in live fire training at a house at the intersection of Pacers Avenue and Darwin Road in the City of Madison. This training session involving live fire conditions was the first experience of this nature by the Recruits.

- That during this fire training scenario, Recruit Cato did not follow the directions that Division Chief Holtz had conveyed to him and the other team members prior to entering the building.

- That Division Chief Holtz shouted "stop" to Recruit Cato as he proceeded into the building.

- That Recruit Cato did not obey the instructions of Division Chief Holtz, probably due to the fact that Recruit Cato was unable to hear the instructions due to the protective equipment worn during the scenario.

- That Division Chief Marcia Holtz stopped the advancement of Recruit Cato by pulling on the hoseline.

- That Division Chief Marcia Holtz approach [sic] Recruit Cato from the side, placed her right hand on the chest of Recruit Cato and pushed him, causing Recruit Cato to strike the wall with his self contained breathing apparatus (SCBA) tank.

- That Division Chief Marcia Holtz, while shouting "where is your crew," struck the right upper arm of Recruit Cato with her left hand.
- That the safety of the Recruits involved in this training scenario was not in jeopardy at any time while they were on the first floor of the building, considering the fact that a safety crew was in place and in the command of a Training Captain.

I have determined, to the best of my ability, that the above descriptions are an accurate account of the occurrences of October 3, 1996.

I have enclosed copies of the nine (9) interview transcript, the two (2) audio tapes of the interviews and the video tape of Channel 15.

FIRE FIGHTERS LOCAL 311

INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS
821 Williamson St.* Madison, WI 53703 * (608)257-2030
FAX 257-1168

January 15, 1996

Chief Debra Amesqua
Madison Fire Department
325 W. Johnson
Madison WI 53703

Chief Amesqua:

I am requesting, on behalf of Local 311's Executive Board, a copy of the facts and findings of the "Division Chief Holtz and Firefighter Cato physical contact incident" investigation.

I am also requesting that you forward, within 30 days, your decision on this matter to the Executive Board of Local 311.

Sincerely,

/s/

Joe Conway, Jr.
President, IAFF Local 311

cc: Madison Board of Police and Fire Commissioners

MADISON FIRE DEPARTMENT
325 W. JOHNSON ST. MADISON, WISCONSIN 53703-3295

DEBRA H. AMESQUA
FIRE CHIEF

TELEPHONE:608/266/4420
FAX: 608/267/1100
INTERNET:
Fire@ci.madison.wi.us

January 28, 1997

Joe Conway, Jr., President
Firefighters Local 311
821 Williamson St
Madison WI 53703

Dear President Conway:

Your request for information as outlined in your letter of January 14, 1997, will not be granted. This is a personnel issue and the matter is still under investigation.

Sincerely,

/s/

Debra H. Amesqua
Fire Chief

DHA:ecl
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CITY OF MADISON
INTER-DEPARTMENTAL
CORRESPONDENCE

DATE: April 9, 1997

TO: Division Chief Marcia Holtz, Training Manager
FROM: Fire Chief Debra H. Amesqua
SUBJECT: Incident of October 3, 1996

I have concluded an investigation into allegations of your sue of questionable measures to control a recruit during a live fire training even held on October 3, 1996. I have reviewed your personnel record, your explanation for your actions and interview details provided by Assistant Chief Bill Spohn. In my review of the total circumstances, I do not find your behavior unreasonable. However, I sense the need for further guidance and training. Therefore, I am requesting an extension of your probation for a period of six months. In addition, I am requiring you to attend an advanced leadership class, designed to improve your decision making and leadership skills.

My conclusion is based on the following:

A) The training event of October 3, 1996 was the first exposure the recruits had to live fire in fully encapsulated protective gear. The sensory deprived nature of this experience as well as the real danger it presents can reveal unpredictable behaviors. Such behaviors unchecked may jeopardize the safety of the individual as well as others. AS stated by both you and recruit Ron Cato, the protective gear may have contributed to confusion and diminished hearing. In an effort to stop recruit Cato from advancing alone into a live fire, you state that you shouted repeatedly but could not get the recruit's attention. The recruit states, "I think I recall Chief Holtz yell stop, and I immediately stopped." The various descriptions of the incident were generally consistent. To the extent they differed I gave less weight to recruit Cato's version based on his unfamiliarity with the situation, his evident confusion and his diminished ability to

hear. I conclude that you used physical contact as a means of communication in an effort to control the situation.

B) After reviewing the Channel 15 video tape, I find that your actions were not protracted but concise and effective in stopping the advancement of a inexperienced fire recruit. To have allowed this recruit to enter a live fire scenario without the established safety practice of staying with one's crew would have been irresponsible. One can not predict the behavior of a recruit that is excited and charged with adrenaline. I conclude that the actions you took were not unreasonable under the totality of the circumstances.

C) Finally, I find clear evidence that you emphasized the importance of teamwork and staying with ones crew prior to entering the building. I find that on October 3, recruit Cato did not obey the instructions and follow directions given to him and the other team members. During your interaction with recruit Cato, you continued to emphasize the importance of the training lesson, asking "Where's your crew?, Where's your crew?" I conclude your comments were professional in content and germane both to the training exercise in general and to the specific instructions you had previously given to the recruit and the other team members.

However, based on your own admission, you state that "you have never taken such extraordinary measures to control a situation." You further state that "you did not feel comfortable with the extent of your interaction" with the recruit. In fact you volunteered that you would benefit from an extension of your probationary period. I expect a Command Officer to react appropriately in critical situations and to take command. While training scenarios are designed to be safe, there is always a potential for a problem. Therefore, to assist you in your continued development as a command officer I am requesting an extension of your probation for a period of six months. Additionally, you must attend an advanced leadership class, arranged by the Department designed to improve your decision making and leadership skills.

While I anticipate no further action at this point, I feel compelled to add that the department is committed to an atmosphere of mutual respect of individuals in professional interchanges. It is important that management personnel act as role models. While I am unable to conclude that your acts were unreasonable in this instance, I caution you that any future use of such measures will be promptly investigated: and to the extent that they are found to be unreasonable or contrary to department standard the conduct may result in discipline up to and including discharge.

DHA:ecl

CC:AMFS

BEFORE THE BOARD OF POLICE AND FIRE COMMISSIONERS
OF THE CITY OF MADISON

Debra H. Amesqua,
Complainant

vs.

Firefighter Ronnie B. Greer,
Respondent

LT. CLARENCE WILLIAMS:
OFFER OF PROOF

I, Clarence Williams, being duly sworn, depose and state the following in answer to the questions posed, for use in lieu of sworn testimony as an offer of proof in the above entitled proceedings.

. . . .

. . . .

5. Please explain the nature of departmental advancement and the function of executive development classes at the National Fire Academy and elsewhere.

Like other careers, advancement in the fire service depends in part upon "building a resume" through experience and training. Besides customary general academic qualifications, those wishing to advance in the service obtain specialized training in various aspects of fire science and management.

"Executive development classes" are highly specialized training courses in management. The most prestigious provider of such specialized training is the National Fire Academy, which is a federally funded agency located in Emmitsburg, Maryland. The "NFA" works in concert with "FEMA," the Federal Emergency Management Agency which also had its

headquarters in Emmitsburg for a time. Those agencies cooperate in planning responses to emergencies and disasters.

Admission to classes at the NFA is possible only by recommendation of departmental chiefs. Admission is very selective and admission slots are limited in number. Admission is so exclusive that it is simply impossible to accommodate all those worthy of recommendation. Consequently, the National Association of Black Professional Firefighters has actually developed its own academy in order to accommodate those in need of such training who are worthy of advancement.

A recommendation to the NFA is viewed in the fire service as a reward and privilege for exemplary and meritorious service. Recommendations are highly prized and sought after among command officers.

. . . .

. . . .

9. Did Ron Greer have a reasonable basis for questioning the possibility of favoritism?

The term "favoritism" is used generally to describe either granting advancement, benefits or privileges which are *not* deserved, or avoiding demotion, discipline or other negative or undesirable job-related matters which *are* deserved.

I have been involved with in hundreds of discrimination cases as investigator, party, *amicus*, consultant, witness, support coordinator, affirmative action officer and IABPFF president. In this case, Amesqua's disposition of the Holtz-Cato incident clearly raises the possibility of favoritism. The video tape alone is sufficient to establish that Holtz's actions were violent, excessive and abusive, and violated generally accepted standards for conduct by command officers.

. . . .

Had a Committee on Accreditation evaluation team observed such conduct in one of our field exercises, I would have recommend denial of NFPA certification because of that conduct. We would have explicitly advised the department to remove that officer from commanding, training or evaluating

personnel until she demonstrated the ability to control her temper and employ acceptable command tactics. Had we been aware of a pattern of conduct such as that suggested by Lt. Conway in his letter, Exh. 24, we would have advised the department that the officer was simply unfit for a command position.

. . . .

Chief Amesqua made findings that Holtz's actions "were not unreasonable under the totality of the circumstances," that they were "professional in content and germane," and that they were "not protracted but concise and effective in stopping the advancement of a [sic] inexperienced recruit." Exh. 2. These conclusions are gratuitous and erroneous, and constitute a justification of Holtz's actions which is totally undeserved.

Further, the six month extension of probation and recommendation to the NFA are insufficient responses to Holtz's actions. An appropriate response, at a minimum, would have been removal of Holtz from a command position. A male command officer engaging in such conduct against a female recruit would have been summarily dismissed from his position. Gender should be irrelevant to such determinations, and dismissal was appropriate in this case.

Thus there is a clear likelihood of favoritism by Chief Amesqua, both in granting favorable assessments that were *not* warranted and withholding severe professional sanctions which *were* warranted.

10. Did Ron Greer have a reasonable basis for questioning the possibility of favoritism based on gender, sexual orientation, personal friendship or a commonly held professional viewpoint?

The News Release mentions several possible bases for favoritism including gender, sexual orientation, personal acquaintance, membership in the professional organization "Women in the Fire Service, Inc." and a commonly held professional philosophy or "agenda."

I concur with the Offer of Proof submitted by Greer regarding his basis for questioning whether favoritism occurred on those bases. Again, I have been involved with and reviewed hundreds discrimination cases. In this case, there is clearly sufficient information in this case to justify a legitimate inquiry whether favoritism occurred based on the factors questioned by Greer in the News Release.

. . . .

. . . .

Dated this 18th day of May, 1998.

/s/ Clarence Williams

State of Louisiana)
)
Parish of Caldo)

Personally came before me this 18th day of May, 1998, the above named Clarence Williams, known to me to be the person who executed this instrument and acknowledged the same.

/s/ John D. Ley

My Commission: for life

RESUME

CLARENCE WILLIAMS
10723 63RD Avenue South
Seattle, WA 98178-2104
Home (206)722-4314
Bus (206)722-8907

PROFESSION EXPERIENCE:

- 25 years experience as a professional fire fighter in the Seattle Fire Department.

- Fire suppression functions including fire fighting, fire prevention, emergency medical services and station maintenance.

- Served as training instructor, training new recruits in all areas of fire fighting and service operations.

- Engineer: As driver of fire apparatus, responsible for knowing fire district, getting apparatus to scene and supplying crew with water.

- Lieutenant: Responsible for commanding personnel at station and planning activities, such as fire prevention and inspections.

- NFPA Representative: Served on the Committee on Accreditation for the National Fire Protection Association (NFPA).

SUMMARY OF QUALIFICATIONS

- Registered Lobbyist with the State of Washington, representing the African American Legislative Agenda.

- Consultant for Pryor, McClendon, Counts & Co., Inc. Investment bankers.

- Served as President of the International Association of Professional Black Fire Fighters (IABPFF).

- Served 10 years as President of Seattle Black Fire Fighters establishing many present ongoing programs.

- Served on the Joint Council of National Fire Service Organization.

- Conducted affirmative action workshops for many national organizations, including Operation PUSH, National Organization of Black Law Enforcement Executives, C. Vaughn Young & Associates, etc.

- Served as consultant for Coalition of Black Retail Associates, National Leadership Roundtable, National Committee to defend Affirmative Action, and various organizations and fire departments throughout the country.

Special Accomplishments

- Helped to organize black fire fighter groups in the Northwest Region and throughout the county.

- Served as Executive Vice President of the IABPFF.

- Served as Northwest Regional Vice President to the IABPFF.

- Served as Affirmative Action Officer of the IABPFF.

- Established Voter Registration Program.

- Established Property Investment Committee and purchased office building for SBFFA.

- Established Advisory Board

- Computerized the IABPFF.

- Introduced Public Speaking Program.

- Participated in a conference on Emergency Management Systems Training at the National Fire Academy (N.F.A) at the request of the N.F.A.

- Participated in the second U.S. Congressional study on the fire problem in America, known as "American Burning".

MILITARY SERVICE:

- College ROTC while attending Southern University in Baton Rouge, Louisiana. Served six years in the Washington State National Guard; Honorable discharge.

COMMUNITY ACTIVITIES

- Served as Treasurer and President of a community action agency with a $3 Million budget.

- Served as Publicity Chairperson of the Girl's Club of Puget Sound.

- Served as Board Member of the Seattle Urban League.

- Chairman of the Board of Trustees at Mt. Zion Church.

- Served on the Executive Committee of United Negro College Fund.

Civic Affiliations

- Northwest Conference of Black Public Officials

- Southern University Alumni of Seattle, WA

- Mount Zion Baptist Church

- Seattle NAACP

- IABPFF

- Alumni Club Leadership Tomorrow Program/Seattle Chamber of Commerce

AWARDS

- 1976 Honorary Fire Fighter's Badge, Shreveport, Louisiana Fire Department

- 1978 Outstanding Service Award, Baptist Temple Church, Shreveport, Louisiana

- 1978 and 1981 Most Outstanding Young Man of america

- 1979 Furthering the Cause of Human Rights, United Nations Association USA

- 1979 Most Outstanding Fire Fighter in the State of Washington, Washington Jaycees

- 1980 Outstanding Leadership as Board President, Central Area Citizens Committee

- 1982 Seattle Urban League Affirmative Action Award

- 1982 Promoted to Lieutenant, Seattle Fire Department

- 1985 Community Service Award, Black Law Enforcement Officers Association of Washington

- 1985 Selected as Who's Who Among Black Americans

MADISON FIRE DEPARTMENT
325 W. JOHNSON ST. MADISON, WISCONSIN 53703-3295

DEBRA H. AMESQUA
FIRE CHIEF

TELEPHONE:608/266/4420
FAX: 608/267/1100
INTERNET:
Fire@ci.madison.wi.us

April 10, 1997

HAND DELIVERED

Joe Conway, Jr., President
Firefighters Local 311
821 Williamson St
Madison WI 53703

Dear President Conway:

My investigation into an October 3, 1996 incident involving Division Chief Marcia Holtz has concluded. As a result of this investigation, I am requesting an extension of her probation for a period of six months. In addition, I am requiring her to attend an advanced leadership class which is designed to improve decision making and leadership skills.

If you wish to discuss this matter further, please contact me at 266-6564.

Sincerely,

/s/

Debra H. Amesqua
Fire Chief

:ecl

News Release
Homosexual Chief rewards Homosexual
Chief for Assault?

Fire Chief Debra Amesqua has issued a decision on the investigation of an incident involving Training Chief Marcia Holtz and a fired firefighter trainee. In the incident, recorded by WMTV News-15 in October 1996, Chief Holtz shoved and screamed at the trainee during a training exercise. An investigation was ordered and a decision based on the investigation was issued on April 9, 1997. It is Chief Amesqua's conclusion that the "questionable measures" (shoving & screaming) used by chief Holtz were not "unreasonable", and that she simply "needs further guidance and training". That training is to be accomplished by "attending an advance leadership class", a training program which is coveted by other chief officers to the extent that there is a "waiting list" to get in! She has also called for a 6 month extension of chief Holtz's probationary period, something she (Chief Holtz) herself appears to have suggested.

Now this would be laughable it were not such a serious matter. A senior officer in essence, physically and verbally assaults an employee and Chief Amesqua finds that "not unreasonable" and that her screaming was "professional in content and germane". In over 17 years of firefighting with both experienced and non-experienced firefighters, I don't believe I've ever seen a situation where it was necessary to physically assault anyone to get their attention or to instruct them. Granted it is often necessary to make physical contact in a fire situation to initiate communication with another firefighter, but never to the extent as we have seen in this incident. So what's so special or different about this case?

I said in October that this matter would be "down played", "swept over" and nothing significant would be done about it. A lot of my fellow firefighters doubted my "prediction". Well, time has "told the story". One does not need to be a prophet, just someone willing to see things as they are.

Consider the following. One would think that if you wanted to achieve clear facts in investigating a matter of this type it would be only proper to have that investigation done by an independent, disinterested party. However, that is not the case here. The investigation was done by another Division Chief who is a subordinate to Chief Amesqua and a staff member with Division Chief Holtz. Is it possible that the investigating officer could have been unduly influenced? Or could the conclusions of the investigation be simply disregarded without opposition by that subordinate?

The relationship between Chief Amesqua and Chief Holtz goes back a ways, namely through their affiliation with an organization called "Women In Fire", an organization seen by most firefighters in this area as a predominantly homosexual organization. Is it possible that some favoritism has been shown here to a fellow member or possible friend? Both are homosexual women, who have been seen in the past (and still now among many), with clear agendas as it concerns women in the fire service. Could it be that their radical agendas has come to play to the extent that even violence can be excused and "glossed over", or in this case, rewarded? Sounds a lot like the much assailed "good- ol-boy" system revived, repainted and given another name.

Now, I'm confused and maybe someone could make sense of this for me; It's not okay to communicate verbally my views on a department chief officer's handling an issue but it's okay to use physical force to communicate with a trainee? Maybe I'm missing something! The department/city is willing to spend thousands of dollars on a case of an alleged comment without proof, on alleged harassment without a complaint or proof, and on an alleged rule violation without action or proof, but "winks" at and rewards physical assault?

Another firefighter is given a disciplinary letter and has the same placed in his employment file because he made a remark regarding homosexuals. He was "off-duty" and happened to stop by the fire station. A letter of discipline?

A fire officer is facing a 12 hour suspension for angrily making comments to a uniform delivery driver whom he is familiar with. A 12 hour suspension?

But yet, it's not unreasonable for a chief officer in anger to physically handle an employee? Imagine if it were a white male chief officer shoving and screaming at a female recruit. Heads would have rolled! So much for fair treatment and equity! Go figure.

Oh, by the way, that male trainee who was the victim, he was mysteriously "let-go" literally days before graduating from the fire academy. Makes you go, "Hmm."

Just sharing my thoughts with you all.

MADISON FIRE DEPARTMENT
325 W. JOHNSON ST. MADISON, WISCONSIN 53703-3295

Debra H. Amesqua
FIRE CHIEF

TELEPHONE: 608/266/4420
FAX: 608/267/1100
INTERNET:fire@ci.madison.wi.us

June 5, 1997

To: Fire Chief Debra H. Amesqua
From: Assistant Chief Carl B. Saxe
Subject: Firefighter Ronnie Greer-Predetermination Finding

A predetermination hearing was conducted for Firefighter Ronnie Greer on Thursday, May 29, 1997 to allow him the opportunity to respond to charges that he had violated Madison Fire Department Work Rules 17, 18, 39, 47, 50, 51 and 65 and Mayor's Administrative Procedures Memorandum 3-5 (formerly 3-29).

. . . .

. . . .

A fair reading of the FAX document as a whole, is as a thinly veiled accusation against you and calls into question the integrity of other members of the Department (specifically Chiefs Spohn and Holtz). It suggests that, contrary to State anti-discrimination laws, you are differentially treating employees on the basis of sexual preference and sex (both Firefighter Greer on the one hand as it relates to the PFC charges and Chief Holtz on the other). It is my interpretation that this is an attack upon your fitness to manage the Department and a suggestion that you have violated the law.

If ever there were conduct that brings the department into disrepute, this is it. It is such a serious and direct attack that, if true, it would warrant suit against the City before the Equal Rights Division and/or charges filed against you before the PFC.

. . . .

. . . .

In conclusion, based on Firefighter Greer's lack of respect for

you, your methods, rank and your management of the Department; his innuendo filled attack on Chiefs Holtz and Spohn; his continued attempts to cast the Madison Fire Department in an unfavorable light; his total lack of regard for the Rules and Regulations of the Department; his absolute refusal to acknowledge the conduct; and his unequivocal assertion of his continued right to do what he did, it is my recommendation that his employment as a Firefighter with the City of Madison be terminated.

BEFORE THE BOARD OF POLICE & FIRE
COMMISSIONERS
CITY OF MADISON

In Re: The Charges Of

CHIEF DEBRA AMESQUA,
Complainant,

-vs-

RONNIE B. GREER,
Respondent.

VOLUME I
TRANSCRIPT OF PROCEEDINGS

Dates: September 29, 1997
October 1, 1997
October 14, 1997
November 10, 1997

Reported by MINDLA ROTHMAN

TRANSCRIPT OF PROCEEDINGS, held in the above-entitled matter, at the City-County Building, in the City of Madison, County of Dane, and State of Wisconsin, on September 29, 1997, October 1st, 1997, October 14, 1997 and November 10, 1997.

. . . .
. . . .

[Excerpt, pages 94 - 95.]

[By Mr. Dean]

Q Would you not agree with me that favoritism by a government official on the basis of race, gender, religion, color,

age, national origin or sexual orientation is in fact a matter of significant public concern?

A Yes.

Q And in fact that kind of favoritism by you, if in fact it happened, would also be a matter of public concern, would it not?

A Yes.

Q Would you agree with me that if in fact you engaged in illegal favoritism that someone ought to blow the whistle?

A Yes.

. . . .

. . . .

[Excerpt, pages 159 - 61.]

CHAIRMAN SEEGER: The Commission is back with the decision. The issues raised by the motion and argument are substantial and far-reaching, but our ruling on the motion is as narrow as practical. We intend to address only the evidentiary problems immediately related to management of our hearing.

We find merit and shortcomings in the arguments of both parties. In our view the Greer press release which drew these charges touches on a matter of public concern clearly enough to require us to entitle Respondent to application of the Pickering balancing test.

To that extent we do not agree with the Chief's argument to exclude various areas of evidence. However, in applying the balancing test we will not require Respondent to establish the ultimate empirical soundness of his factual assertions and assumptions.

We will not condition his constitutional rights on our judgment of his accuracy. In fact we doubt that this forum could provide a reliable vehicle for proving or disproving all

that Respondent has asserted.

We will allow the parties to explore Respondent's actual knowledge, his actual views and his actual motives, if they choose to do so, and we will expect argument from the parties as to the standards other than accuracy by which we should evaluate his statements. We will not entertain a more general inquiry into the factual validity of the press release.

For these reasons the motion in limine is granted.

. . . .

. . . .

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WISCONSIN

RONNIE B. GREER,
Plaintiff,

v. CIVIL ACTION NO. 98 C 560 C

DEBRA H. AMESQUA, et al.,
Defendants.

AFFIDAVIT OF MICHAEL D. DEAN

STATE OF WISCONSIN)
) ss
COUNTY OF WAUKESHA)

Michael D. Dean, being duly sworn on oath, deposes and says,

. . . .
. . . .

4. The Commission excluded the following exhibits based on its ruling in limine to prohibit evidence regarding the truth of Greer's News Release, and Greer agreed to submit them as part of his offers of proof: 2, 3, 11 (original cassette tapes, photocopy of tapes is included in binder for reference), 12 (original Channel 15 videotape of Holtz-Cato incident, photocopy of videotape is included in binder for reference), 13, 14, 15, 16, 17, 25, 26, 27, 29, 30, 31, 32, 34, 35, 36, 37, 38, 39, 40, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 63, 64, 69, 73, 74, 80, 81, 82. Greer maintains that these exhibits were improperly excluded from evidence.

. . . .
. . . .

Dated this 13 day of May, 1999.

/s/ Michael D. Dean

Subscribed and sworn to before me
this 13 day of May, 1999.

/s/ Lisa S. Freeman
Notary Public, State of Wisconsin
My Commission: December 30, 2001

FOR THE WESTERN DISTRICT OF WISCONSIN

RONNIE B. GREER,
Plaintiff,

v. CASE NO. 98 C 560 C

DEBRA H. AMESQUA, ALAN SEEGER, MARGARET MacMURRAY, BYRON BISHOP, LYNN HOBBIE, MARIO MENDOZA, THE CITY OF MADISON FIRE DEPARTMENT, THE CITY OF MADISON, THE CITY OF MADISON POLICE AND FIRE COMMISSION, and ABC INSURANCE COMPANY,
Defendants.

DEPOSITION OF:

A L A N K. S E E G E R

Madison, Wisconsin

May 4, 1999

9:30 o'clock a.m.

. . . .
. . . .

[Excerpt, pages 19 - 20.]

[By Mr. Dean]

Q I do recall personally bringing boxes and boxes of paper to the hearings.

As far as the exhibits -- strike that.

The first -- one of the exhibits, I believe it was a videotape tape, Exhibit Number 12 which I do not have an actual reproduction of here today, do you recall however that

I at one point introduced that videotape as an exhibit in the hearing?

A I recall that there was a videotape, yes.

Q And that videotape was the videotape that was the subject or one of the primary subjects of the news release by Ronnie Greer which we've identified as Exhibit 2 in this deposition; is that correct?

A As I recall the video was of a portion of a newscast on channel -- from Channel 15 regarding firefighter training.

Q During the Commission's deliberation did the Commission actually watch that videotape?

A I don't believe we did during deliberations.

. . . .

. . . .

FOR THE WESTERN DISTRICT OF WISCONSIN

RONNIE B. GREER,
Plaintiff,

v. CASE NO. 98 C 560 C

DEBRA H. AMESQUA, ALAN SEEGER, MARGARET MacMURRAY, BYRON BISHOP, LYNN HOBBIE, MARIO MENDOZA, THE CITY OF MADISON FIRE DEPARTMENT, THE CITY OF MADISON, THE CITY OF MADISON POLICE AND FIRE COMMISSION, and ABC INSURANCE COMPANY,
Defendants.

DEPOSITION OF:

MARIO MENDOZA

Madison, Wisconsin

May 4, 1999

9:30 o'clock a.m.

. . . .
. . . .

[Excerpt, pages 11 - 12.]

[By Mr. Dean]

Q Thank you. And the record should reflect the witness did take several minutes to review the offers of proof before responding. Do you recall that Mr. Greer during his – udring his hearing submitted a videotape into evidence which was a portion of a broadcast by Channel 15 which displayed an incident involving Chief Holtz – Assistant Chief Holtz and

Recruit Trainee Ron Cato at a fire drill approximately October of 1997 [sic]?

MR. MODL: I object as multiple. Is the question does he recall such a tape being offered?

MR. DEAN: Yes, that' correct.

A I believe that there was a tape offered to the Commission.

Q Did you ever review that vbediotape at any time either during the hearing or as part of your deliberations?

A The videotape [offered] to the Commission?

Q Yes. Did you actually review that?

A No.

. . . .

. . . .

BEFORE THE BOARD OF POLICE AND FIRE COMMISSIONERS OF THE CITY OF MADISON

Debra H. Amesqua,
Complainant

vs.

Firefighter Ronnie B. Greer,
Respondent

CHIEF GEORGE FRIEDELL:
OFFER OF PROOF

I, George E. Friedell, being duly sworn, depose and state the following in answer to the questions posed, for use in lieu of sworn testimony as an offer of proof in the above entitled proceedings.

. . . .

. . . .

20. Did Amesqua grant a more favorable disposition in this incident than would ordinarily be expected?

Absolutely. On the critical issues such as Holtz's position in line at the beginning of the exercise, how large the gap was between Cato and Hodo, and whether Cato had stopped prior to Holtz striking him, Amesqua disregarded the testimony of the entire rest of the crew and accepted Holtz's version. Other than her general comment that she reviewed the materials received from Spohn, there is no indication from her report that she even read the statements of the other recruits.

For such an extraordinary incident, Amesqua's cursory report is woefully inadequate. Given that virtually all the witness statements and evidence contradict Holtz's version on critical points, such omissions by Amesqua clearly indicated a bias and predisposition justify Holtz's conduct.

A detailed review and assessment of *all* the statements and evidence yields only one conclusion -- that the strongest condemnation and severest sanctions of Holtz's conduct was warranted, not the justification provided by Amesqua.

. . . .

. . . .

Dated this 16th day of May, 1998.

/s/ George E. Friedell

State of New York)
)
County of Nassau)

Personally came before me this 16th day of May, 1998, the above named George Friedell, known to me to be the person who executed this instrument and acknowledged the same.

/s/ Robert Sereon

My Commission: 9/3/98

516-681-3316

George E. Friedell
26 Chadwick Rd.
Syosset, L.I., N.Y. 11791

Deputy Chief
N.Y.C. Fire Dept. (Ret)
City University of New York

Licensed & Bonded
Fire Protection Consultant

11 May 1998

Michael D. Dean, Esq.
20975 Swenson Drive, Suite 125
Waukesha, Wisconsin 53186

Att: Mr. Michael Dean
Re: Amesqua vs Greer
Madison, Wisconsin
Our File No. 2198

This additional reporting is submitted to your office as a conclusion with recommendation to the above matter.

The offers of proof submitted are described both factually and with summation and are both correct. They represent the writer's experience and knowledge over 34 years of fire department work effort, together with twenty two semesters of professional teaching in the City of New York College. The substance of this case is directly in line with the above background.

. . . .

. . . .

Discussion

A fire department is a sem-military organization. It is unthinkable that a subordinate would strike a superior. It is, however, even more indefensible that the reverse should occur. When it does happen, the most severe evaluations and procedures must be instituted against the offender. That was not

accomplished in this instance.

As the "punishment" was administered by Ms. Amesqua--to wit, an extended probation and an assignment to a highly desirable training school--it is considered to be totally inadequate and, at the very least, smacks of favoritism.

The proper actions to be taken by this Chief of Department are (not necessarily in this order, nor that only one should be taken):

1. a) Dismissal from the Department. Ms. Holtz was on probation, and no recourse would have been available by this person.

b) Suspension from all duties for an extended period of time and a fine to be determined.

c) A personal apology to the recruit because of the multiple personal attacks on him

d) Restoration of Mr. Cato to the Department; the records show no reason for his dismissal or failure to have him continue his career.

e) Presentation of the facts to the citizens of Madison, Wisconsin, to assure the public that the fire department of that city will not tolerate such irreconcilable conduct. It (a) had been accomplished, there would have been to need for Mr. Greer to speak out.

2. a) The civil rights of this firefighter were abrogated. Just as surely as no such language would be acceptable while on duty (from a fire protection stand-point), he had a right -- and perhaps a duty (see below) -- to state a set of conditions which were being downgraded and "swept under the rug."

b) If the incorrect conduct of Chief Holtz had not been so flagrant and indefensible, "in-house" actions might have sufficed, and this matter would not have reached the flash point when someone (Mr. Greer) felt correctly that he had to speak out.

Conclusions and Recommendations

The many other facets of this matter are well defined in the offer of proof. But after the voluminous file is examined and extraneous material is set aside, only two factors exist:

1. The Conduct of Chief Holtz regarding her words and actions cannot be tolerated or accepted. The proper approach to assure that no one else would adopt this kind of training approach is to apply a punishment to fit the circumstance. It is repeated--this was not done.

2. The importance of this situation and the slap on the wrist did cause Mr. Greer to speak out. The opinion of this office--again from a fire protection approach--is that it is his right to speak and address a very serious matter.

George E. Friedell
Deputy Chief NYC Fire Dept (Ret)

Asst. Professor NYCCC (78)

GEF/nca
CC: File
516-681-3316

George E. Friedell
26 Chadwick Rd.
Syosset, L.I., N.Y. 11791

Deputy Chief
N.Y.C. Fire Dept. (Ret)
City University of New York

Licensed & Bonded
Fire Protection Consultant

Curriculum Vitae

Education: New York City CC Fire Science Program AAS
Baccalurate Program City Univ. of New York
B.S.

Employment: New York City Fire Department
1942-1951 Firefighter
1951-1957 Lieutenant Engine Company 256
1959-1960 Captain Ladder Company 22
1960-1966 Battalion Chief
1966-1976 Deputy Chief of the Department

In my most recent position of Deputy Chief, I had Administrative and management control of four Battalions. With 35 fire companies, approximately one thousand members and fire officers.

Teaching: As New York City Comm. College of City University:
Appointed to Faculty in 1967
Instructor, Fire Science 1967-1970
Lecturer Fire Science 1979-1972
Asst. Professor Fire Protection 1972-1978

In an original, and then more recent assignment I have prepared, presented, and received approval for the following curricula:

FT 501 Fire Hazards and Controls-Basic
FT 502 Fire Hazards and Controls-Advanced

FT 503 Fire Protection Administration: Staffing Fire Investigation, Arson Control, Supervision, Fire Prevention, Sprinkler and Standpipe Systems, etc.

Military Service	On Military leave from the Fire Dept.-1943-1945 Lieut. USAAF 1943-1951, including active duty and Air Force Reserve until 1951-Captain
Personal	Son, NYC Fire Department BS in teaching Daughter, Boston Area MA Languages Daughter, Albany Area MAPublic Administration, MA Education
Fire Protect-Consulting	Advisor NY State Senate and Assembly Committees, Teacher of Insurance-Company Adjustors, underwriters, Licensed Private Investigator for fire investigation, Have investigated and evaluated thousands of fires, Consultant to Insurance Companies, Utilities, Law Firms, Go to court for testimony on many occasions as both a defense or plaintiff witness, in about equal numbers.

BEFORE THE BOARD OF POLICE & FIRE
COMMISSIONERS
CITY OF MADISON

In Re: The Charges Of

CHIEF DEBRA AMESQUA,
Complainant,

-vs-

RONNIE B. GREER,
Respondent.

VOLUME III
TRANSCRIPT OF PROCEEDINGS

Date: February 3, 1998
Time:5:27 p.m.

Reported by MINDLA ROTHMAN

TRANSCRIPT OF PROCEEDINGS, held in the above-entitled matter, at the City-County Building, in the City of Madison, County of Dane, and State of Wisconsin, on February 3, 1998, commencing at 5:27 p.m.

. . . .

. . . .

MR. DEAN: Let me restate it.

Q Do you believe that Ron did in fact intend to raise questions about the printed items you have summarized in Question 8?

A Yes, I do. Ron is a lot of things, but he's not a liar.

. . . .

. . . .

[Excerpt, page 416.]

....

....

....hypothetical review of the complainant's proposal. The Statement of Charges proposes a two-month suspension as a general penalty for all counts but does not specify a separate proposed discipline for each count. As penalty for the violation of APM 3-29 set forth in Count I we impose a suspension of one month.

In making this determination we have considered respondent's record of service but find nothing there which ameliorates the gravity of this misconduct. On the contrary, we find respondent's record of discipline generally, and before this Board in particular, to be uniquely abysmal and disheartening. The current case is the fourth time that respondent has been before this Board on charges brought by a chief, all of which have been meritorious. [*Roberts v. Greer*, October 1987, *"Greer I;" Roberts v. Greer*, August 1993, *"Greer II;" Roberts v. Greer*, November 1994, *"Greer III;"* the instant case, *Amesqua v. Greer,* February 1997, *"Greer IV;"*] His record in these cases and in other respects reflected in this record shows persistent incapacity to conform himself consistently to the appropriate requirements of ordinary civil conduct reasonably expected of any public employee, especially a sworn fire officer. In attempting to impose suspension in her letter of November 27, 1996, (Exhibit 20), Chief Amesqua encouraged respondent to improve his conduct and cautioned him that future misconduct would result in more serious penalties. We are not overly confident that this discipline will accomplish a change in respondent's pattern of conduct. However, we are confident that this Board will not suspend him again.

<u>Count II, Rules 18 and 51, Respect for superiors and disrepute of department</u>

Rule 18 Members shall... treat their superiors with respect...

Rule 51 Officers and members shall at all times conduct themselves so as not to bring the Department in disrepute.

General Comments Despite the energy and effort of respondent and his counsel to focus our attention on his religious beliefs and ....

....

....

Madison Fire Department
Employee Discipline File

Employee	Date	Charges	Discipline Imposed
....	....	....	....
26	4/10/93	Failure to Report to Duty-18	SWOP 18 hours
26	9/13/94	Refusal to Obey Order-4,18,24,26,51	SWOP 2 weeks
26	1/20/96	Refusal to Obey Order and Insubordination-18,24,39,51,65, APM3-29	SWOP 2 Months
26	6/10/97	Insubordination, disrepute-18,39,51,65, APM 3-5	Pending
...	...	...	...

LR-Letter of Reprimand
SWOP-Suspended Without Pay
AWOP-Absent Without Pay

Vorlander: Fire officials sought lesbian

By Kevin Murphy Correspondent for the Capital Times

Did Madison officials go out of their way to hire a lesbian to be the city fire chief?

A top Madison Fire Department official now asserts he was passed over for the chief's post because the city was determined to hire a lesbian for the Job. Philip Vorlander, executive assistant fire chief, made that charge in an amended discrimination complaint filed Tuesday with the state.

Chief Debra Amesqua, 44, has declined to answer questions about her sexual preference.

"We do not view sexual preference as a negative personally to Amesqua," Vorlander's attorney, Robert Gingras, said today. everyone is entitled to their own preference. We're just saying it is improper for the commission to consider that in hiring her."

Three women and two men were members of the Police and Fire Commission when Amesqua was hired last December and included Margaret McMurray, who is a lesbian, Gingras stated in a letter to the Equal Rights Division.

Amesqua received information early about the Madison job from lesbians in the Fire Department and McMurray, Gingras stated.

McMurray even discussed the hiring process with Amesqua at the Gay Olympics in New York City months before former Fire Chief Earle Roberts announced his retirement, Gingras stated.

Vorlander's latest accusation makes public allegations made privately by firefighters in the months since Amesqua's hiring: that a network of lesbians worked to give her an advantage over better qualified candidates.

Asked if a resurgence of the allegation might strain relations in the fire department, Gingras acknowledged that could be a concern.

"But Vorlander has a right to expect, as should the entire department, that a fair hiring process be utilized to select the fire chief. Our contention is that a fair process clearly was not employed," said Gingras.

He said Vorlander is seeking unspecified monetary damages

and an appointment as chief.

In his original complaint filed in June, Vorlander alleged that he was passed over for promotion because he was a white man. Amesqua as chosen "because (the PFC) intended to fill the position with a minority individual regardless of the comparative qualifications," he said.

Amesqua was hired despite the fact that I was clearly the more qualified candidate," Vorlander said.

Also in papers filed with the state Tuesday, a union official in Tallahassee, Fla., charged that Amesqua was not missed when she left to come to Madison.

Amesqua "was widely disliked among firefighters at the TFD, and to be frank, most of the firefighters were happy to see her go when the Madison Police and Fire Commission came to visit," Reggie Brown, the Tallahassee department's union chief, said in a statement filed Tuesday with the States Equal Rights Division.

When PFC members visited Tallahassee, firefighters told them that Amesqua did not relate well to the staff, even though she was the department's training chief, Brown stated. Amesqua "had absolutely no management experience" and was responsible for only one employee there, Brown stated. Amesqua was "completely unqualified" for the Madison chief's job based on her experience and interpersonal skills," Brown stated.

Brown and Amesqua were unavailable for immediate comment.

Attorneys for the PFC have claimed that Vorlander was not promoted in part because he was unpopular with the rank and file.

Vorlander claimed that his unpopularity stemmed from his participation in the cross-staffing experiment the department attempted before Roberts' retirement. Some firefighters felt cross-staffing increased safety risks to them and decreased the department's responsiveness.

Attorneys for the PFC cited Vorlander's failure to distance himself from the cross-staffing controversy in his response to an interview question on the subject showed the PFC that Vorlander would likely "reopen (those) old wounds" if he became chief.

Vorlander disputed the PFC's assessment that he enjoyed only moderate support within the department and submitted endorsements from firefighter's union Vice President Joe Conway Jr. and 10 members of the department's management team.

The number of people who supported Vorlander's selection are "too numerous to list exhaustively," Vorlander's attorney, Gingras stated in a letter to the Equal Rights Division.

Vorlander finished third to Amesqua and Gary Westbrook, then a union Vice president. Westbrook's experience did not qualify him to lead the department and was ranked second by the PFC in an attempt to shield it from accusations that it discriminated against white male applicants in the hiring process, Gingras stated.

The PFC ranked Westbrook between Amesqua and Vorlander so Amesqua's qualifications would be compared to Westbrook's and not to Vorlander's, Gingras stated.

Although Amesqua's 13 years as a firefighter amounted to only half of Vorlander's experience, it was widely believed that she had the inside track on the chief's job here before the selection process began, Gingras stated.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WISCONSIN

RONNIE B. GREER,
Plaintiff,

v. CIVIL ACTION NO. 98 C 560 C

DEBRA H. AMESQUA, et al.,
Defendants.

AFFIDAVIT OF RONNIE B. GREER
IN OPPOSITION TO DEFENDANTS' MOTION FOR
SUMMARY JUDGMENT

STATE OF WISCONSIN)
) ss
COUNTY OF DANE)

Ronnie B. Greer, being duly sworn on oath, deposes and says,

. . . .

. . . .

48. In response to Defendants' Findings 25 - 29, Chief Amesqua's sexual orientation is no secret. She arrived in Madison with a "gay liberation" bumper sticker on her car. She brought her "partner" to one of her first press conferences. I attended the press conference and talked to many people as I usually do. Among those I talked to was a woman who identified herself in that way, saying in reference to Chief Amesqua, "I'm her partner." Additional facts regarding my knowledge of Chief Amesqua's homosexuality are contained in my Offer of Proof, Plaintiff's App. 14.

. . . .

. . . .

51. In response to Defendants' Finding Fact No. 34, my view that Amesqua is a poor leader because of her character is shared by Local 311. In its "Amesqua Report," Local 311 cited numerous instances of apparent dishonesty, favoritism, arbitrariness and manipulation. It called for an investigation and for Amesqua's resignation or removal. Local 311 conducted an unprecedented ballot in which Department members issued an overwhelming vote of no confidence in her leadership.

. . . .

. . . .

152. The Holtz Incident I section of the Amesqua Report states,

Division Chief M. Holtz Incident 1

Fire Lieutenant Marcia Holtz was officially promoted to Division Chief in May 1996. She was to be on probation for one year as per the usual process. On October 3, 1996 during a live fire training exercise involving recruit class 13. (a physically shoving and intimidating shouting was captured on film.) Division Chief Marcia Holtz stopped a fire recruit while he was making entry into a structure. Division Chief Marcia Holtz grabbed him, and pushed him into a wall and repeatedly slammed her forearm into his cheats while screaming at him. This action was caught on video and shown on channel 15 on November 5, 1996.

Division Chief M. Holtz reported this incident to Fire Chief Debra Amesqua on the day that it happened October 3, 1996. No Investigation was started, no interviews were conducted, no disciplinary proceedings were begun against Division Chief M. Holtz. There is reason to believe at this time that rules 9 and 26 of the Madison Fire Department were broken but nothing was done until this film was shown on November 5, 1996. Division Chief M. Holtz brought a copy of this film to Fire Chief Debra Amesqua on November 8, 1998 (see Exhibit 43)

After reviewing the film, Fire Fighter's Local 311 requested that Division Chief Marcia Holtz be relieved of duty pending further investigation. Fire Chief Debra Amesqua responded six days later, stating that she reviewed policies with the city attorney and the Madison Police Department and that Division Chief Marcia Holtz would remain Chief of Training. After consulting with the Madison Police Department and the City Attorneys office at the direction of Fire Chief Debra Amesqua an internal investigation was started with Assistant Chief W. Spohn collecting the facts.

Fire Fighters' Local 311 officers and/or executive board members were told by Assistant Chief William Spohn and former Assistant Chiefs Fred Kinney and Philip Vorlander that Fire Chief Debra Amesqua's conclusion drawn in her April 9, 19979 letter to Division Chief M. Holtz did not contain the same facts, some of the facts were distorted, and that Fire Chief Debra Amesqua slanted the report, and that it did breech the spirit of the investigation. Assistant and Division Chiefs at that time verbally made recommendations that varied from termination, demotion and reassignment. Assistant Chief Spohn made no recommendations. None of these recommendations were put in writing however.

Fire Chief Debra Amesqua ignored advice when determining the penalty for Division Chief Marcia Holtz. Division Chief Marcia Holtz was given as a penalty (1) an extension of her probation for 6 months and (2) the requirement that Division Chief Marcia Holtz attend an advance leadership class designed to improve her decision making and leadership skills.

Former New York City Deputy Fire Chief, and Former Fire Science faculty at City University of New York George Friedell, and now an expert witness in fire department related areas has put into the public record with the PFC a deposition. When asked if Fire Chief Amesaqua did grant a more favorable deposition

[disposition] in this incident than would normally be expected, he stated "Absolutely."

Fire Lieutenant Clarence Williams, a Seattle firefighter, former President of International Association of Professional Black Firefighters, and now an expert witness in fire and affirmative action related areas has put into the public record with the PFC a deposition. When asked to comment on Fire Chief Debra Amesqua's findings on Division Chief Marcia Holtz, he stated "These[] conclusions are gratuitous and erroneous, and constitute a justification of Holtz' action which were undeserved." "Thus there is clear likelihood of favoritism by Chief Amesqua, both in granting favorable assessments that were not warranted and withholding severe professional sanctions which were warranted."

Fire Fighter's Local 311 has concluded:

(1)Fire Chief Debra Amesqua in all probability ignored advice and findings, which were not to her liking.
(2)Fire Chief Debra Amesqua in all probability took an investigative report and made conclusions, which were contrary to the spirit of the investigative report.
(3)Fire Chief Debra Amesqua gave a penalty in this incident which was very mild in relation to the offense.
(4)Fire Chief Debra Amesqua in all probability showed favoritism in this matter.

Were rules 9 and 26 of the Madison Fire Department broken by Division Chief M. Holtz, and then ignored by Fire Chief Debra Amesqua?

Why did it take Fire Chief Debra Amesqua over 6 weeks to being an investigation into inappropriate behavior admitted to by Division Chief M. Holtz? Amesqua Report, Holtz Incident 1 Section, pages 1 – 2.

. . . .

. . . .

155. The Holtz Incident 2 section of the Amesqua Report states,

Division Chief M. Holtz Incident 2

Fire Lieutenant Marcia Holtz was promoted to Division Chief in May 1996. Her one-year probationary period was extended six months because of an incident that happened on October 6, 1996. A decision was reached to extend her probation at the end of March 1997. She was given a written warning and other penalties as outlined in Division Chief M. Holtz Incident I.

Division Chief Marcia Holtz had two other incidents involving a fire recruit. (December 23, 1997 and January 5, 1998) Division Chief Marcia Holtz lost her temper and forcibly grabbed and screamed at this recruit. One of the department rules requires that members control their tempers and exercise the utmost patience and discretion. mayor's memorandum 2-25 having to do with workplace violence prevention and response was also violated.

Division Chief Marcia Holtz was suspended for six hours without pay and ordered to undergo anger management training. This incident and penalty needs to be compared with other incidents and penalties in the Madison Fire Department having to do with anger, shouting, and unprofessional conduct that have happened within the last two years.

On February 12, 1997 a Madison Fire Lieutenant became angry with a uniform/clothing vendor over a size and order problem. He lost his temper and was verbally abusive. He acted inappropriately and unprofessionally. He was not issued a warning. He was given as 12-hour suspension without pay.

On July 18, 1997 two Madison firefighters became angry

with each other over an incident at a car fire. A fire ax was given and returned in a very aggressive manner. These two firefighters argued. They were of the same rank. This argument widened to include another firefighter. This incident involved shouting, name-calling and the handling of a tool in an aggressive manner. none of these firefighters had a prior incident of this nature. None of these firefighters were issued warnings. Two were given 12-hour suspensions without pay and one a 6-hour suspension without pay. One accepted a 12-hour suspension without pay. Two of them chose to appeal the suspensions to the PFC and are now facing a possible 96-hour suspension without pay.

Firefighter's Local 311 has concluded:

(1)Fire Chief Debra Amesqua administers penalties arbitrarily and capriciously for similar unprofessional offenses in a dissimilar and inconsistent manner.
(2)Fire Chief Debra Amesqua gives warnings and second chances for unprofessional conduct arbitrarily and perhaps with favoritism.
(3)Fire Chief Debra Amesqua appears to hold chief officers to a lower standard of professional behavior than rank and file firefighters based upon penalties given to date.

Why were others given a much longer suspension without pay for similar conduct?

Why were others not given a second chance or warning as was given to Division Chief Marcia Holtz?

Why are Division Chiefs held to a lower standard of professional conduct than firefighters? Amesqua Report, Holtz Incident 2 Section, pages 1 – 2.

. . . .
. . . .

Dated this 10 of May, 1999.

/s/ Ronnie B. Greer
Ronnie B. Greer

Subscribed and sworn to before me
this 10 day of ~~April~~, May 1999.

/s/
Notary Public, State of Wisconsin

My Commission: _____

(2)

No. 00-461

Supreme Court, U.S.
FILED
OCT 25 2000
CLERK

In The

Supreme Court of the United States

RONNIE B. GREER,

Petitioner,

v.

DEBRA H. AMESQUA, ALAN SEEGER, MARGARET MacMURRAY, BYRON BISHOP, LYNN HOBBIE, MARIO MENDOZA, THE CITY OF MADISON FIRE DEPARTMENT, THE CITY OF MADISON, THE CITY OF MADISON POLICE & FIRE COMMISSION, and WISCONSIN MUNICIPAL MUTUAL INSURANCE COMPANY,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

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OPINIONS BELOW

Petitioner Ronnie Greer ("Greer") commenced the present action under 42 U.S.C. § 1983 against the City of Madison, Wisconsin, its Fire Chief Debra Amesqua, the City of Madison Board of Police and Fire Commissioners ("Commission"), the individual members of the Commission, the City of Madison Fire Department and the City of Madison's insurer, Wisconsin Municipal Mutual Insurance Company (hereinafter, collectively, the "City Defendants"). Greer alleged violation of his First Amendment speech rights and his right to due process of law and equal protection under the Fourteenth Amendment to the United States Constitution. The City Defendants denied Greer's claims and asserted a number of defenses. Greer's claims arose out of a decision by the Commission, issued on July 31, 1998, terminating Greer's employment for violation of City of Madison policies prohibiting harassment in the workplace and for violation of various City of Madison Fire Department rules and regulations. This disciplinary action was the fifth (5th) time in a ten (10) year period that Greer had appeared before the Commission on charges initiated by various City of Madison Fire Chiefs and the fifth (5th) time that the Commission found the charges to be meritorious, resulting in discipline of Greer. Greer did not appeal the Commission's discharge decision as he was permitted to do under state law. Instead, Greer filed a federal civil rights action challenging the Commission's decision.

Greer moved the district court for a preliminary injunction which the court denied based upon a finding that Greer lacked a probability of success on the merits. Greer did not appeal the denial of his motion for a preliminary injunction. The parties then filed cross-

motions for summary judgment on all claims. The district court, in its June 21, 1999 Opinion and Order, denied Greer's motion for summary judgment and granted the City Defendants' motion for summary judgment, concluding that the Defendants had violated none of Greer's federal constitutional rights. The trial court dismissed Greer's First Amendment speech claim, finding that the City's interests in efficiently operating its Fire Department outweighed Greer's interest as a firefighter in issuing the "news release." The court ruled that Greer had received all the process to which he was constitutionally due and, therefore, had no Fourteenth Amendment due process claim against the City Defendants. Finally, the trial court concluded that Greer's equal protection claim must be dismissed because Greer had not been treated differently than similarly situated firefighters, based upon either gender or sexual orientation. Greer appealed all issues decided adversely to him by the district court.

The United States Court of Appeals for the Seventh Circuit, in a unanimous decision, affirmed the district court's decision in all respects. The court of appeals, in ruling on Greer's due process claim, concluded that his predetermination hearing was constitutionally adequate under the procedural due process component of the Fourteenth Amendment. The court of appeals concluded that Greer had been provided an impartial decision-maker consistent with Fourteenth Amendment due process standards. The court of appeals also rejected Greer's due process argument that the departmental rules were so vague as to not provide adequate notice of the proscribed conduct.

The court of appeals also rejected Greer's equal protection challenge to his termination. The court of appeals

observed that "where an employee has an 'undisputed record of gross insubordination' as Greer does, the employee must show that another grossly insubordinate worker was treated better than him to defeat the presumption that his comparatively harsher punishment was attributable to his poor disciplinary history." (Petitioner's Appendix at p. 19a.) The court of appeals concluded that Greer had failed to show that he was similarly situated to members of the unprotected class allegedly treated better than Greer.

Finally, the court of appeals rejected Greer's First Amendment retaliatory speech claim. The court of appeals, relying on the balancing test enunciated by this Court, in *Pickering v. Board of Education of Township High School District*, 391 U.S. 563 (1968), concluded that the City of Madison Fire Department's interest in disciplining Greer outweighed Greer's interest in issuing the subject "news release."

Greer petitioned the United States Court of Appeals for the Seventh Circuit for a panel rehearing and rehearing *en banc*. The United States Court of Appeals for the Seventh Circuit denied Greer's petition.

Greer has petitioned the United States Supreme Court for a writ of certiorari, challenging only the court of appeals' ruling on the First Amendment issue. Greer does not challenge the decision dismissing Greer's Fourteenth Amendment due process and equal protection claims.

RESPONSE TO CRITERIA FOR CERTIORARI REVIEW

The rules of the United States Supreme Court set forth those limited circumstances under which the Supreme Court will use its limited resources and grant a petition for a writ of certiorari. Greer's Petition for a Writ of Certiorari meets none of the criteria set forth in Supreme Court Rule 10. The Supreme Court may grant certiorari review where the subject court of appeals' decision conflicts with the decision of another court of appeals on an important federal matter. Greer claims that the district court and court of appeals did not consider the truth of his statements in applying the *Pickering* balancing test and that this failure creates a conflict between Seventh Circuit decisions and other federal circuits. The Supreme Court should reject this argument for several reasons.

First, the Commission, in considering Greer's news release, specifically stated that it was treating Greer's statements regarding the Holtz/Cato dispute as true. The Commission, although noting that, in content, Greer's statements were "shallow; uninformed and uninformative," concluded that it would "not condition [Greer's] constitutional rights on our judgment of his accuracy." (Petitioner's Appendix at p. 44a.) Accordingly, the Commission assumed Greer's statements in his "news release" to be true. There is nothing in the district court or the court of appeals' decision to the contrary. Greer's argument, therefore, that courts must consider the truth of a statement in applying the *Pickering* balancing test is a non-issue since the Commission and the lower courts assumed Greer's statements to be true.

Additionally, this case does not present any conflict within the federal circuits. Greer cites several Seventh Circuit court of appeals' decisions, including *Wright v. Illinois Department of Children & Family Services*, 40 F.3d 1492 (7th Cir. 1994), and *Feldman v. Bahn*, 12 F.3d 730 (7th Cir. 1993), for the proposition that a court must consider the truth of the subject statements in applying the *Pickering* balancing test. Under Greer's analysis, these cases are consistent with cases from other circuits. At most, Greer is complaining that the court of appeals' decision in the instant case is in conflict with other Seventh Circuit decisions. The appropriate redress under these circumstances is to seek a rehearing *en banc* with the applicable court of appeals. Greer sought such review and the United States Court of Appeals for the Seventh Circuit denied his petition for *en banc* review.

There simply is no basis for the Supreme Court to conclude that the Seventh Circuit's decision in the case at bar is in conflict with other courts of appeals' decisions on the question of whether to consider the truth of a statement in application of the *Pickering* balancing test.

The only other Supreme Court criterion for review which Greer attempts to fit this case within is that the court of appeals "decided an important question of federal law that has not been, but should be, settled by this Court." (Sup. Ct. R. 10.) Greer attempts to fit his petition within this criterion by claiming that the lower courts erred, in applying the *Pickering* balancing test, when they relied on evidence not before the Commission. This argument is also fatally flawed. The district court explicitly stated that it was not relying on evidence not before the Commission: "I find that even if, as plaintiff insists, I exclude evidence not before the commission at the time of

its decision and accept the commission's decision that plaintiff's speech addressed matters of public concern, his speech is still not entitled to First Amendment protection under the *Pickering* balancing test." (Petitioner's Appendix at p. 42a.) Accordingly, the issue which Greer would like this Court to consider is simply not presented in this case.

However, even if the issue were properly presented by the facts, the Supreme Court should not use its limited resources to review this issue. A determination of whether there is just cause to discharge an employee under state law and the determination of whether an individual's First Amendment rights are violated by the discharge from employment are two (2) entirely different inquiries. One would certainly not anticipate that all facts relevant to the *Pickering* balancing test would be presented in the context of an administrative hearing involving just cause to discharge an employee. Relatedly, one would not anticipate that an employer, in a subsequent federal court proceeding, would be precluded from presenting evidence relating to the factors considered in the *Pickering* balancing test simply because this evidence was not presented in the administrative hearing involving the just cause determination.

Because Greer satisfies none of the criterion for certiorari review set forth in Supreme Court Rule 10, this Court should deny Greer's Petition for a Writ of Certiorari.

STATEMENT OF THE CASE

This case arose out of the Commission's July 31, 1998, decision to terminate Greer's employment as a City of Madison, Wisconsin firefighter for violation of the City's policies prohibiting harassment in the workplace and for violation of several fire department rules and regulations. Greer was openly anti-homosexual and challenged the Fire Chief from the date she was hired as chief because of his belief that she was a lesbian. The Commission suspended Greer for his anti-homosexual activities which violated the City's written policies prohibiting harassment in the workplace on the basis of a person's sexual orientation. The Commission subsequently terminated Greer's employment in a separate disciplinary proceeding for his improper conduct in issuing a "news release" entitled *News Release – Homosexual Chief Rewards Homosexual Chief for Assault?*

Rather than appeal his discharge from employment as permitted under state law, Greer filed a federal civil rights action alleging that the Commission's decision was erroneous and in violation of Greer's constitutional rights. Greer claims that the Commission erred by not admitting into evidence several offers of proof which he made at the Commission hearing. The appropriate challenge to evidentiary determinations by the factfinder in a state administrative proceeding is through the appeal channels allowed by state statute, not through federal court review.

This case is a run-of-the-mill First Amendment public employee speech case which lower federal courts consider on almost a daily basis. Greer was an anti-homosexual crusader and personalized his crusade in challenging

his boss, the Chief of the City of Madison Fire Department. Greer made accusations about the Chief's sexual orientation and, with limited information about a disciplinary decision by the Chief, accused the Chief of favoritism based upon sexual orientation. The United States District Court for the Western District of Wisconsin and United States Court of Appeals for the Seventh Circuit applied the *Pickering* balancing test that this Court formulated in the *Pickering* decision and has developed in numerous public employee speech cases since *Pickering*. The lower courts appropriately applied the factors under the balancing test and properly concluded that the balance weighed in favor of the City defendants. There is absolutely nothing novel or significantly different in the lower courts' application of the *Pickering* test in this case from the numerous other federal court decisions which are adequately guided by this Court's First Amendment public employee speech jurisprudence. Supreme Court review would be a waste of this Court's limited resources.

STATEMENT OF FACTS

The Commission, by decision and order dated July 31, 1998, terminated the employment of Greer as discipline for engaging in conduct in violation of City of Madison and Fire Department policies and rules. (Petitioner's Appendix at pp. 94a-121a.) The discharge decision was based upon Greer's self-styled "news release" which he circulated to local media in April 1997. (*Id.*) Greer's discharge was based upon five (5) independent grounds. (*Id.*) First, Greer was discharged for violation of Fire Department Rule 51 which provides "officers and

members shall at all times conduct themselves so as to not bring the department in disrepute." (Rule 51, City of Madison Fire Department Work Rules.) (*Id.*) Second, Greer was discharged for violation of Fire Department Rule 18 which provides in relevant part:

> Members shall . . . treat their superiors with respect . . . Members . . . shall conform to the rules and regulations of the department, observe the laws and ordinances, and render their services to the City with zeal, courage, and discretion and fidelity.

(Rule 18, City of Madison Fire Department Work Rules.) (*Id.*) Third, Greer was discharged for violation of Fire Department Rule 39 which provides:

> Members must conform to and promptly and cheerfully obey all laws, ordinances, rules, regulations, and orders, whether general, special or verbal, when emanating from due authority. They shall be strictly on time to the minute, and obedience must be prompt, implicit, unqualified and unequivocal.

(Rule 39, City of Madison Fire Department Work Rules.) (*Id.*)

Fourth, Greer was discharged for violation of Fire Department Rule 65, which provides:

> Employees shall not harass co-employees because of their sexual orientation either by the use of derogatory verbal or written comments, graphic materials, gestures or conduct which would interfere with the performance of their duties. "Sexual orientation" means having a preference for heterosexuality, homosexuality,

> bisexuality, having a history of such a preference, or being identified with such a preference.

(Rule 65, City of Madison Fire Department Work Rules.) (*Id.*) Finally, Greer was discharged for violation of City of Madison Administrative Procedure Memorandum ("APM") 3-5, which prohibits harassment in the workplace on the basis of sexual orientation and other protected characteristics under state and federal law. (*Id.*)

Greer prepared and circulated his "news release" in April 1997. (Respondents' Appendix at p. 14.) Greer forwarded the "news release" to at least the *Capital Times* and *Wisconsin State Journal* and may have circulated the release to television and radio stations. (*Id.* at p. 15.) When Greer forwarded the "news release" to the media, he understood that the press could publish some or all of it. (*Id.*) Greer had no objection to the press publishing his "news release" and never told the press to not publish the release. (*Id.* at pp. 16-17.)

In the title of the "news release," the first reference to a "homosexual chief" referred to Chief Amesqua and the second reference referred to Division Chief Marcia Holtz. (*Id.* at p. 17.) Amesqua never informed Greer as to her sexual orientation. (*Id.*) Amesqua has never publicly acknowledged her sexual orientation. (*Id.* at pp. 17-18; Amesqua Affidavit, para. 30, Respondents' Appendix at p. 83.) Greer never asked Amesqua for permission to make the allegations in the "news release" and Amesqua never informed Greer that he had her consent to make the statements, including referring to her as "homosexual chief." (Respondents' Appendix at p. 18.) In fact, Greer had asked the Chief about her sexuality and Amesqua had informed him on at least two (2) occasions that her

sexual activity and orientation were not relevant to her performing her job. (*Id.* at p. 20.)

Greer believes that homosexuality is a perversion which relates to whether someone has a good character. (*Id.* at p. 21.) Greer believes if an individual is a homosexual, that reflects negatively on his or her character. (*Id.*) Greer has stated this view publicly on a number of occasions and has made this type of statement to firefighters prior to the time he sent out his "news release." (*Id.*)

Greer believes that Amesqua is a poor leader because of her character which in part, in his opinion, is because of her sexual orientation. (*Id.* at pp. 21-22.) Greer believes that Chief Amesqua's sexual orientation is a factor she will have to overcome and is a problem. (*Id.* at p. 26.) Greer also believes that Amesqua's sexual orientation is a character flaw that impedes her from effectively doing her job. (*Id.*)

Greer believes that homosexuality is sinful, destructive to individuals, and destructive to society that accepts it. (*Id.* at p. 27.) Greer has made public statements that he believes homosexuals should be discriminated against in employment. (*Id.* at pp. 27-28.) Greer has made statements that he believes homosexuals should not be permitted to hold positions of authority, including the position of Fire Chief. (*Id.* at p. 28.) Greer has also expressed views that he believes homosexuals molest children. (*Id.*) Greer has discussed the above views with other firefighters. (*Id.*)

In the "news release," Greer refers to Holtz as a homosexual. (*Id.* at p. 30.) Greer has never asked Holtz for consent to disclose her sexual orientation. (*Id.*) Holtz has never informed Greer that he has her consent to

disclose her sexual orientation. (*Id.*) Greer did not even recall if Holtz had informed Greer that Holtz allegedly is a lesbian. (*Id.* at p. 31.)

Greer's "news release" references an incident between Holtz and firefighter recruit Ron Cato. (*Id.*) In October 1996, Amesqua learned about an incident which occurred during a training exercise at the Firefighter Academy involving Recruit Cato and Holtz. (Amesqua Affidavit, at para. 10; Respondents' Appendix at p. 81.) This incident involved physical contact between Holtz and Cato. (*Id.* at para. 11, p. 81.) Amesqua assigned Assistant Chief Spohn to investigate this matter. (*Id.* at para. 12, p. 81.) Spohn conducted an investigation and provided a report and recommendations to Amesqua. (*Id.* at para. 13, p. 81.) Amesqua reviewed Spohn's report and the file in this matter and determined that Holtz could benefit from additional training. (*Id.* at paras. 14-15, p. 81.) Amesqua also extended Holtz' probation for six (6) months as a result of the incident. (*Id.* at para. 15, p. 81.)

Greer was not present when the incident between Cato and Holtz occurred. (Respondents' Appendix at p. 32.) Greer was not questioned about the incident and was not in any way a part of the investigation. (*Id.*) Greer did not have and had not seen any investigative findings before he prepared and circulated the subject "news release." (*Id.*) Spohn had not revealed to Greer who Spohn had spoken with as part of his investigation. (*Id.* at p. 33.) Spohn had not informed Greer of what conclusions Spohn came to in his investigation, why he came to any particular conclusions or what recommendations he was making to the Chief. (*Id.* at pp. 33-34.) None of the Assistant or Division Chiefs had advised Greer of any specific information regarding the Holtz/Cato matter

before Greer sent out his "news release." (*Id.* at pp. 34-35.) Greer did not discuss with Amesqua the findings of Spohn's investigation or what recommendations Spohn had made. (*Id.* at pp. 36-37.)

Prior to distributing the "news release," Greer had not seen the investigation report and had not been told the reasons for any recommendations by Spohn. (*Id.* at pp. 37-38.) Prior to the time Greer distributed his "news release," he had no knowledge as to Amesqua's reasons for her disciplinary decision. (*Id.* at p. 38.) In fact, Greer has never spoken with Amesqua about the reasons for her decision regarding discipline of Holtz. (*Id.*) Greer testified that he did not recall if he had even spoken with Cato before he sent out his "news release." (*Id.* at p. 42.) Greer had not spoken with Holtz before he sent out the "new release." (*Id.*)

Greer stated in his "news release":

> The investigation was done by another Division Chief who is a subordinate to Chief Amesqua and a staff member with Division Chief Holtz. *Is it possible that the investigating officer could have been unduly influenced?*

(Petitioner's Appendix at p. 180a.) Greer testified that he is not aware of any special relationship between Spohn and Holtz. (Respondents' Appendix at pp. 43-44.) Greer had no information that Spohn conducted the investigation in any way which was influenced by the fact that Holtz was a fellow staff member. (*Id.* at p. 44.) Prior to distributing the "news release," no one informed Greer

that Spohn had been improperly influenced in the recommendations which he made. (*Id.*) Greer is not aware of any conduct by Spohn during the course of the investigation which Greer thought was improper. (*Id.*) Greer is not aware of any individual who Greer believes Spohn should have but did not speak with as part of his investigation. (*Id.* at p. 45.)

In the "news release," Greer identifies himself as a firefighter with over seventeen (17) years of firefighting experience. (Petitioner's Appendix at p. 179a.) Greer stated in his "news release" that the Holtz/Cato matter was "downplayed" and "swept over." (*Id.*) Greer referenced the organization "Women in Fire" in his "news release" as an organization seen by most firefighters as a predominantly homosexual organization. (*Id.* at p. 180a.) Greer also viewed this organization as a predominantly lesbian organization. (Respondents' Appendix at pp. 48-49.) Greer's reference to the "clear agendas" and "radical agendas" in the "news release" related to Greer's belief that Amesqua and Holtz advocated for homosexuals. (*Id.* at p. 49.)

Greer suggests in the "news release" that favoritism based on Amesqua and Holtz allegedly being lesbians may have been a reason for Amesqua's discipline decision. (*Id.* at pp. 47-48.) The "news release" suggests that Amesqua "excused and glossed over" Holtz' conduct regarding the Cato matter based upon Holtz' sexual orientation. (Petitioner's Appendix at p. 180a.)

Greer, in reference to the Cato incident, stated in his "news release" that Cato was "mysteriously 'let go' literally days before graduating from the fire academy. Makes you go, 'Hmm'." (*Id.* at p. 181a.) Greer testified that he

still does not know why Cato was terminated from employment. (Respondents' Appendix at p. 53.)

Much of the second page of the Greer "news release" discusses personal disputes between Greer and Amesqua. (*Id.* at p. 179a-181a; Respondents' Appendix at pp. 50-53.) Specifically, several references in the first paragraph of page two (2) of the "news release" relate specifically to Greer's disputes with Amesqua, including the pending disputes which led to Greer's suspension in June 1997. (Respondents' Appendix at pp. 51-53.) At the time Greer distributed his "news release" to the media, the issue of his suspension was pending before the Commission. (*Id.* at p. 51.)

Greer understood that it would be a violation of the law if Amesqua made disciplinary decisions based upon a person's sexual orientation. (*Id.* at pp. 64-65.) Greer acknowledged that he suggested in his "news release" that Amesqua had violated state and federal law. (*Id.* at p. 65.) Greer acknowledged that this allegation in his "news release" would be embarrassing to Amesqua. (*Id.*) Greer sent the "news release" in part as Ron Greer, the firefighter. (*Id.* at p. 73.) Greer testified that if someone believed that Amesqua had acted illegally as suggested in the "news release," that could discredit the Chief. (*Id.* at p. 75.) Greer testified that if people believed that Amesqua was meting out discipline unfairly, that could affect their attitudes regarding whether Amesqua acted fairly, in disciplining others and could create difficulty with these people accepting the Chief's decisions. (*Id.* at p. 76.)

On or about May 1, 1997, Amesqua became aware of Greer's "news release" and a newspaper article which appeared in the *Capital Times* newspaper which was

based upon the "news release." (Amesqua Affidavit at para. 16, Respondents' Appendix at p. 81.) Greer acknowledges that the May 1 newspaper article is based upon his "news release." (*Id.* at pp. 80-81.) Amesqua assigned Assistant Chief Saxe to investigate Greer's conduct in providing the offensive "news release" to the press. (*Id.* at para. 17, p. 81.) Assistant Chief Saxe contacted Greer and advised him of the investigation. (Respondents' Appendix at p. 55.) Assistant Chief Saxe held a pre-determination hearing with Greer. (*Id.* at pp. 56-57.) Greer brought the union president with him to the pre-determination hearing. (*Id.* at p. 58.) Assistant Chief Saxe asked Greer if he had prepared the "news release" and Greer admitted that he had. (*Id.* at p. 56.) Saxe also inquired as to whether Greer had distributed the "news release" to the media and Greer admitted that he had. (*Id.*) Greer was permitted to make whatever statement he wished relating to the questions he was asked at the pre-determination hearing. (*Id.* at p. 60.) At the end of Assistant Chief Saxe's questions, Greer was given the opportunity to add whatever information he chose within the questions asked. (*Id.* at pp. 60-61.) Greer had no recollection of Assistant Chief Saxe preventing Greer from saying anything at the pre-determination hearing. (*Id.* at p. 62.)

Greer understood that part of Assistant Chief Saxe's investigation included talking to Greer, talking to a reporter and talking with other individuals. (*Id.* at p. 57.) Assistant Chief Saxe completed his investigation on or about June 5, 1997, and prepared a report and recommendation which he forwarded to Amesqua. (Amesqua Affidavit, para. 18, Respondents' Appendix at p. 82.) Assistant Chief Saxe recommended that the employment of Greer be terminated. (*Id.* at para. 19, p. 82.)

Amesqua reviewed Assistant Chief Saxe's June 5, 1997 report and the file in this matter. (*Id.* at para. 20, p. 82.) In correspondence dated June 10, 1997, from Amesqua to Greer, Amesqua informed Greer that based upon Greer's conduct regarding the content and distribution of the "news release" to the press, Amesqua had concluded that Greer's employment with the Department should be terminated. (*Id.* at para. 21, p. 82.) Amesqua provided to Greer the opportunity to resign, which Greer declined to do. (*Id.* at para. 22, p. 82.) Amesqua filed formal charges with the Commission, seeking Greer's dismissal on or about July 28, 1997. (*Id.* at para. 24, p. 82.)

The Commission issued its decision and order on or about July 31, 1998, sustaining all five (5) counts of the charges and immediately terminating Greer's employment as a firefighter. (Petitioner's Appendix at pp. 94a-121a.)

Greer received a copy of the Fire Department Work Rules when he was in the recruit academy. (Respondents' Appendix at p. 10.) Changes to the rules were posted on the bulletin board in the fire station where he worked. (*Id.* at p. 12.) Each fire station maintained a book with the Fire Department rules. (*Id.*) If Greer needed a copy of the work rules, they were available to him. (*Id.*) If Greer had questions as to what a work rule meant, one of the Division Chiefs was readily available to him. (*Id.*) When Greer had questions about what a work rule meant, he would ask. (*Id.* at pp. 10-11.) Greer understood the work rules which he had been charged with violating and knew these rules existed. (*Id.* at p. 63.) Greer was aware that disrespect of a superior was a work rule violation.

(*Id.*) Greer was aware of the work rule prohibiting bringing the Department into disrepute. (*Id.*) Greer also was aware of Fire Department rules prohibiting harassment at the Fire Department. (*Id.*) Greer was aware of the above rules in May-June of 1997. (*Id.* at pp. 63-64.)

Greer received the City's APM prohibiting harassment in the workplace. (*Id.* at pp. 2-3.) Greer received this memorandum before 1995 and read it. (*Id.* at p. 3.) Greer had been a discussion facilitator for firefighters on issues of harassment. (*Id.* at p. 2.) Greer received a copy of the City's APM prohibiting harassment in the workplace on an annual basis for a number of years. (*Id.* at p. 4.) When Greer had questions regarding the anti-harassment APM, he addressed these to various City officials, including the City's Affirmative Action Director. (*Id.* at p. 3.) The City's APM prohibits harassment on the basis of sexual orientation. (*Id.* at pp. 85-90.) Greer believed that he had received training on the City's anti-harassment memorandum. (*Id.* at pp. 5-6.) Greer understood that sexual orientation as used in the APM referred to homosexuality. (*Id.* at p. 7.) Greer agrees that it is a legitimate policy of the City to not permit harassment in the workplace. (*Id.*) Greer also agrees that it is important to firefighting that there not be harassment in the workplace. (*Id.* at p. 8.)

Amesqua received complaints from City of Madison residents, as well as firefighters, regarding Greer's verbal attacks on homosexuals. (Amesqua Affidavit at para. 25, Respondents' Appendix at p. 83.) Greer, himself, acknowledges that he has received negative comments about his views on homosexuality. (Respondents' Appendix at p. 74.) In bringing charges to the Commission recommending termination of Greer's employment as a

firefighter, Amesqua was seriously concerned with the disruptive effect of Greer's inappropriate comments on other employees, on management and on the public's confidence of the City of Madison to provide firefighting services to all citizens regardless of their sexual orientation. (Amesqua Affidavit at para. 26, Respondents' Appendix at p. 83.) Amesqua, in bringing charges seeking Greer's dismissal was concerned with Greer's inability to maintain a civil relationship with his supervisors. (*Id.* at para. 27, p. 83.) Discipline and employee comradery are essential for the safe and efficient operation of the Fire Department. (*Id.* at para. 28, p. 83.) Greer's comments as reflected in the "news release" had the serious potential to adversely affect the efficient operation of the City of Madison Fire Department. (*Id.*)

Greer was at the press conference where it was announced that Amesqua had been hired as the City's Fire Chief. (Respondents' Appendix at p. 23.) Greer talked to reporters that day and was critical of the decision to hire Amesqua. (*Id.* at pp. 24-26.) Greer also attended Amesqua's swearing in ceremony. (*Id.* at p. 76.) Greer stood in the back of the swearing in proceedings and held a sign objecting to the hiring decision. (*Id.*) Greer objected to the hiring of Amesqua based in part on what he believed to be her sexual orientation. (*Id.* at p. 77.) Greer was the sole vocal, visible dissenter at the swearing in ceremony. (*Id.*) Greer has testified that between the hiring of Amesqua in January 1996 and Greer's termination, Greer has been critical of Amesqua at least fifty (50) times. (*Id.* at p. 27.)

Since the hiring of Amesqua, Greer has had between six (6) and ten (10) contacts with her. (*Id.* at p. 70.) These contacts included attendance at staff meetings, as well as contacts at fire scenes. (*Id.*)

Firefighters are an extremely close group. (*Id.* at pp. 39-40.) It is critical that there be good working relationships between firefighters. (*Id.*) Greer acknowledges that firefighting presents life and death situations and firefighters need to be able to depend on one another. (*Id.* at p. 40.) Greer admits that an extremely serious problem would result if there are questions whether one firefighter can trust another. (*Id.*) Greer is distrustful of people he believes to be homosexuals. (*Id.* at p. 41.)

Firefighters must respond to emergencies. (*Id.* at p. 66.) In these emergencies, trust between firefighters who are often in life and death situations is critical. (*Id.*) Greer admits that trust in emergency firefighting situations is probably more significant than anywhere else. (*Id.*) Greer admits that firefighters must always work as a team when responding to emergencies. (*Id.*) At a fire scene, complying with authority is important. (*Id.* at p. 78.) Greer acknowledges that firefighters are expected to respect the chain of command at the Fire Department. (*Id.* at pp. 71-72.)

SUMMARY OF ARGUMENT

In this relatively routine First Amendment public employee speech case, the district court and court of appeals applied the well-established *Pickering* balancing test and concluded that the employer's interest in efficiently and effectively operating its fire department outweighed Greer's interest in making statements about the Chief's alleged sexual orientation and the specific disciplinary action taken by the Chief. Greer, displeased with the judicial decisions, has sought Supreme Court review. Apparently recognizing that the First Amendment employee speech question raises no novel federal issues, Greer attempts to couch the issues presented in his petition for a writ of certiorari in a manner which suggests that the case presents new and important federal issues.

First, Greer argues that the United States Supreme Court should grant review because this case raises the issue of the role of truth of the subject speech in the *Pickering* analysis. This issue is not presented in the instant case because the Commission expressly stated that it was not conditioning Greer's speech rights on the accuracy of his statements. Accordingly, the Commission presumed that Greer's statements about the Holtz/Cato incident were true. Furthermore, the lower courts applied the *Pickering* balancing test to Greer's "news release," treating Greer's speech as if it were true.

Second, Greer claims that the Commission erred in excluding certain evidence at the Commission hearing regarding the truthfulness of his statements. Again, this is not an issue since the Commission assumed that

Greer's statements in the "news release" were true. However, issues regarding evidentiary rulings at a state administrative hearing are more appropriately reviewed under applicable state law, not in a federal civil rights action. Wisconsin law permits appellate review of Commission decisions. Greer, having decided to forego state appellate review of the Commission's decision in this case, cannot obtain review in a federal court civil rights lawsuit.

Finally, Greer claims that the district court and court of appeals erred in considering, during its First Amendment analysis, evidence not before the Commission. This argument is meritless. The district court stated that it was not considering evidence outside the Commission record and the court of appeals affirmed the district court's decision. Accordingly, the issue regarding consideration of extra-Commission evidence is not presented in this petition. However, even if the issue were presented, it would have been appropriate for the district court to consider evidence which was not before the Commission in applying the *Pickering* balancing test. The Commission determined whether there was just cause to terminate Greer's employment. The First Amendment analysis presents a different inquiry. It would be error to foreclose presentation of evidence in a federal court proceeding on the *Pickering* factors simply because the evidence was not presented at an administrative hearing which considered an entirely different issue.

ARGUMENT AND AUTHORITIES

I. WHETHER COURTS MUST CONSIDER THE TRUTH OF A STATEMENT IN APPLYING THE PICKERING BALANCING TEST IS NOT PRESENTED IN THE CASE AT BAR BECAUSE THE LOWER COURTS CONSIDERED THE TRUTH OF GREER'S "NEWS RELEASE" AND GAVE GREER THE BENEFIT OF THE DOUBT REGARDING ITS VERACITY.

Greer argues that the Seventh Circuit erred by not considering the truth of his statements in applying the *Pickering* balancing test and ultimately concluding that the Defendant Fire Department was justified in terminating him. Greer is mistaken. The Seventh Circuit not only considered the truthfulness of the "news release," but gave Greer the benefit of any doubt regarding the truthfulness of Greer's statements.

Greer contends that the truth of his "news release" must be considered under the *Pickering* balancing test because the interests supporting protection are greater if his statements were true or reasonable. In the case at bar, the Seventh Circuit applied the *Pickering* balancing test to Greer's "news release," correctly recognizing that the *Pickering* balancing test applies only to speech that is true or reasonably believed to be true. The Seventh Circuit assumed that the statements in Greer's "news release" were true or that Greer reasonably believed the statements to be true.

The Seventh Circuit's assumption regarding the truthfulness of the "news release" is consistent with the treatment of the "news release" by the district court, the Commission and the Fire Department. The district court, like the Seventh Circuit, in applying the *Pickering* balancing test to the "news release," treated the "news release"

as if it were true. The Commission, in considering Greer's "news release," explicitly stated "we will not condition [Greer's] constitutional rights on our judgement of his accuracy." (Petitioner's Appendix at p. 44a.) Moreover, the Fire Department dropped its charges against Greer under Fire Department Rule 47, which requires employees to "speak the truth at all times" and Fire Department Rule 50, which prohibits "false reports."

Throughout this litigation Greer has argued that true speech deserves absolute protection. This position is not supported by the law of this Court or any federal circuit court. Moreover, as the lower courts correctly concluded, true speech is *not* absolutely protected. Where the lower courts, as they did in the case at bar, gave Greer's "news release" the benefit of any doubt regarding its veracity, there is no further consideration the lower courts could give to Greer's statements short of absolute protection.

Because the Seventh Circuit considered the truthfulness of Greer's statement in applying the *Pickering* balancing test, assuming such statement to be true, Greer's petition seeks certiorari review of a nonissue in the case at bar. The Supreme Court should not allocate its scarce resources to examine a well-settled issue which does not present in this case. Accordingly, Respondents respectfully request that the Supreme Court deny Greer's Petition for a Writ of Certiorari.

II. THE SEVENTH CIRCUIT'S DECISION DOES NOT CONFLICT WITH DECISIONS OF OTHER CIRCUITS.

Greer argues that the Seventh Circuit's decision in this case conflicts with decisions of other circuit courts as

well as prior Seventh Circuit decisions because the Seventh Circuit allegedly did not consider the truthfulness of Greer's "news release." Greer's argument is fatally flawed. For the reasons set forth in Section I, *supra*, there can be no reasonable dispute that the Seventh Circuit not only considered the truthfulness of Greer's statements, but gave his statements the benefit of any doubt with respect to their veracity. As such, the issue which Greer claims is the subject of conflict among the circuits and, therefore, warranting certiorari review, i.e., whether courts must examine the truth of an employee's statement under the *Pickering* balancing test, does not present in this case.

Additionally, this case does not present any conflict within the federal circuits. Greer cites several Seventh Circuit decisions, including *Wright v. Illinois Department of Child & Family Services*, 40 F.3d 1492 (7th Cir. 1994), and *Feldman v. Bahn*, 12 F.3d 730 (7th Cir. 1993), which he contends stand for the proposition that a court must consider the truth of the subject statements in applying the *Pickering* balancing test. Greer has gone to great lengths in his Petition to establish the consistency between these Seventh Circuit decisions and decisions from other circuits which he claims stand for the same proposition. As such, Greer's own Petition confirms that there is no conflict between the circuits regarding whether courts should consider the truthfulness of the subject statements in applying the *Pickering* balancing test. At most, Greer is complaining that the Seventh Circuit's decision in the instant case is in conflict with other Seventh Circuit decisions. Under these circumstances, the appropriate redress is to seek a rehearing *en banc* with the governing circuit court. In the instant matter, Greer

sought a panel rehearing as well as a rehearing *en banc* with the Seventh Circuit and the Seventh Circuit court of appeals denied Greer's Petition.

Greer also attempts to force this case before the Supreme Court under its conflict criterion by claiming that there is a conflict between the Seventh Circuit and the Ninth Circuit regarding whether recklessly false statements are unprotected *per se*. Once again Greer is seeking certiorari review of a nonissue in the case at bar. The issue of whether recklessly false statements are unprotected *per se* does not present in this case because the Seventh Circuit not only applied the *Pickering* balancing test under the belief that Greer's statements were true or believed to be true, but specifically stated that, for the purpose of its review, the Seventh Circuit had "assumed that Greer's news release was *not* recklessly false." (Petitioner's Appendix at p. 26a (emphasis added)). Because the issue of whether recklessly false statements are unprotected *per se* is a nonissue in this case, Respondents respectfully request that the Supreme Court deny Greer's Petition for a Writ of Certiorari.

III. THE ISSUE OF WHETHER IT WAS PROPER FOR THE DISTRICT COURT TO CONSIDER EVIDENCE NOT BEFORE THE COMMISSION IS NOT PRESENTED BY THE CASE AT BAR.

Greer contends that the Supreme Court should grant certiorari review in this case to consider whether it is error for a district court, when implementing the *Pickering* balancing test, to consider evidence which was not before the employer at the time of the subject employment decision. This case does not present that issue

because the district court expressly stated that it was not considering such evidence when it struck the *Pickering* balance in favor of the City of Madison. Even if the question were presented, it would not merit Supreme Court review. Greer has not identified any division in the circuits on this issue. Additionally, considering evidence not in the possession of the employer at the time of the employment decision does not conflict with any United States Supreme Court authority. Finally, Greer's position on the merits of the issue is incorrect.

In support of their motion for summary judgment, the City defendants included deposition testimony of Greer taken in this litigation, as well as an affidavit of Chief Debra Amesqua. Greer argued, in his summary judgment responsive materials, that the district court, in analyzing Greer's First Amendment claim, should not consider any information which was not before the Commission. Defendants argue that the Commission decided whether there was just cause to discharge Greer, not necessarily whether the discharge violated Greer's First Amendment rights. Accordingly, it would be error for the district court to refuse to consider evidence which was not presented to the Commission, but which was relevant to application of one or more of the *Pickering* factors. The district court determined that it did not need to reach this issue because, based upon the information before the Commission, the *Pickering* balance tipped in favor of the City Defendants. Specifically, the district court stated:

> I find that even if, as plaintiff insists, I exclude evidence not before the commission at the time of its decision and accept the commission's decision that plaintiff's speech addressed matters of public concern, his speech is still not entitled to

First Amendment protection under the *Pickering* balancing test.

(Petitioner's Appendix at p. 42a.) The court of appeals affirmed the district court's decision.

The United States Supreme Court, in *Waters v. Churchill*, 511 U.S. 661 (1994), ruled that speech which is subject to the *Pickering* balancing test is that speech which the employer determined to have occurred following a reasonable investigation. Greer apparently is seeking Supreme Court review to request that the United States Supreme Court extend *Waters* to bar all evidence not considered by an employer, regardless of whether the employer even considered the First Amendment issue and the *Pickering* balancing test in the employer's employment decision. Although a potentially interesting question, this issue must await another day for decision. The issue is not presented in this case since the lower courts adopted Greer's position and applied the *Pickering* balancing test without considering Greer's deposition testimony and the Amesqua affidavit, other than for background facts.

Greer points to no split in the circuits on the above issue. Additionally, Greer does not contend that considering extra-Commission evidence conflicts with United States Supreme Court authority. Rather, Greer seeks certiorari review on this issue, apparently under the Supreme Court criterion that this is an important issue of federal constitutional law which has not been, but should be, settled by the Supreme Court. The Supreme Court should permit the federal circuit courts to develop the law in this area. There is no reason to believe that the *Waters* decision has not provided adequate guidance to the lower courts.

The fact that there have been no conflicts in the circuits regarding the scope of the *Waters* decision suggests that *Waters* has provided adequate guidance to the lower federal courts.

Greer's position on the scope of the *Waters* case is in error. Greer would have this Court rule that information which was not before the employer when it made its employment decision is inadmissible in a First Amendment case. Under Greer's theory, a determination by an employer that the employer's interest in efficiently operating its business outweighs an employee's interest in speaking out on a matter of public concern would foreclose federal court review of the First Amendment issue. Alternatively, even if an employer had not considered a *Pickering* factor, such as potential disruption of the subject speech on an employer's business, the employer, in a subsequent federal civil rights case, would be barred from presenting evidence on one of the *Pickering* factors. There can be a number of reasons why an employer would not consider such evidence at the time of the employment decision. For example, the First Amendment issue may not have been a factor at all in the subject employment decision. It would be senseless to say that a court may not consider evidence on one of the *Pickering* factors for purposes of the First Amendment analysis where no party had reason to present such information to the employer at the time of the employment decision.

In the appropriate case, the Court may choose to consider what factual determinations made by an employer following a reasonable investigation should be subject to the *Waters* analysis. This case, however, is not that case.

CONCLUSION

On the basis of the argument and authority set forth above, the Respondents respectfully request that the United States Supreme Court deny Greer's Petition for a Writ of Certiorari.

Dated this 25th day of October, 2000.

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IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF WISCONSIN

RONNIE B. GREER, Plaintiff, -vs- DEBRA H. AMESQUA, ALAN SEEGER, MARGARET MacMURRAY, BYRON BISHOP, LYNN HOBBIE, MARIO MENDOZA, THE CITY OF MADISON FIRE DEPARTMENT, THE CITY OF MADISON, THE CITY OF MADISON POLICE & FIRE COMMISSION, and ABC INSURANCE COMPANY, Defendants.	Case No. 98 C 560 C

Deposition of:

RONNIE B. GREER

Madison, Wisconsin
April 13, 1999

Reporter: Sarah R. Finley

* * *

[33] A I believe so.

Q What?

A That was the same thing that the commission imposed with the exception of the sensitivity training.

She had imposed the same thing they imposed, but she had initially suspended me for three months without pay and then mandatory attendance and sensitivity training. The commission simply ruled that I was suspended for three months. They never mentioned the other part of it.

Q Did you ever receive any sensitivity training after that incident?

A No.

Q Did you feel you needed it?

A No.

Q Have you received sensitivity training or anti-harassment training since you've been employed by the City?

A Yes. I was a discussion facilitator in the training for the firefighters and in the military.

Q What experience did you have in the military?

A I was facilitator in a similar program back in the Seventies.

Q Did you receive any training on the Administrative Procedure Memorandum prohibiting harassment in the

* * *

[35] guidelines. That basically said this is the rule. Sort of like something the City initiated.

Q At some point did you receive a copy the City's Administrative Procedure Memorandum prohibiting harassment in the workplace?

A Yes.

Q Did you receive that prior to 1995?

A I'm – I'm not sure, but I'm sure I did. I'm not sure about what day it occurred. Yeah, I would say, yes, before 1995. Once again, Mayor Soglin was the mayor the first time, so, yeah, I'd say before '95.

Q Did you read it when you received it?

A Yes.

Q Did you have any questions about that memorandum?

A Sure.

Q And did you address those questions to anyone?

A Yes.

Q Who was that?

A The administration, the district chief, the officer in charge at the time, the mayor at the time, the Affirmative Action officer, number of people.

Q Who was the Affirmative Action officer at the time?

A At the time it was Kirbie Mack.

Q The current Affirmative Action director?

A Yes.

* * *

[37] what the City has used that memorandum to cover. There was never any specifics from the City, in my mind,

that would tell you what it did cover and didn't cover. That was the problems I had with it.

Q I'm handing you what's been marked Exhibit 7 for your deposition.

A Uh-huh.

Q Exhibit 7 is the decision of the Police and Fire Commission dated July 31, 1998, and attached to that is a three-page document, Administrative Procedure Memorandum No. 3-5. Do you see that?

A Yes.

Q Can you look at Administrative Procedure Memorandum No. 3-5 and tell me if that's the policy that you received regarding harassment in the workplace?

A Yes. This is the later sort of edition of it, yes.

Q And you received a copy of this?

A Yes. Everybody got one every year.

MR. DEAN: Just a previous objection as vague as to time.

Q When did you actually receive it? When did you first receive, to your knowledge, any draft of the Administrative Procedure Memorandum prohibiting harassment in the workplace?

A I don't remember. I just know we got one every year [38] for a number of years.

Q And each year when you received a copy of this memorandum did someone explain to you what it meant?

A No.

Q What was the form in which you received a copy?

A It was in your – they have kind of a disposition system in the fire station. The chief officer brings out a big envelope with mail, they call it, for the day. And each copy had the firefighter's name and station number on it, and they basically distributed it to each firefighter.

Q Do you see the Administrative Procedure Memorandum attached to Exhibit 7 that has the subject of it in capital letters at the top?

A Yes.

Q And subject to this includes sexual orientation; is that right?

A Yes, it does.

Q Did you read through the Administrative Procedure Memorandum when you received it each year?

A Probably not, no.

Q Did you have any questions about Administrative Procedure Memorandum 3-5 at any time after 1996?

A The question is probably still the same.

Q Did you address those questions that you had to anyone [39] after 1996?

A Not that I can recall. I mean, no, I don't think so. I'm not sure.

Q Did you ever receive any training or any inservice from any City employee, including fire department

or City attorney's office, regarding Administrative Procedure Memorandum 3-5 or any earlier version?

A The earlier versions I think we did. The later version I'm not sure. I would probably say we – yeah, I'm not sure. I would guess we did, but I couldn't tell you specifically.

Q So if the City records indicate that you were present at training where this Administrative Procedure Memorandum was discussed you wouldn't dispute that, would you?

A No. One question. This doesn't seem to be the entire thing. There are a couple more pages missing from this.

Q What do you think is missing?

A There's one page that outlines the state law, that gives a commentary on the state law. Then there's another section that defines harassment, sexual harassment. This is not the whole thing. The whole thing is about five pages, I think, five or six pages. This is the cover – this was a cover letter for the

* * *

[41] Q Is there a difference between those, in your opinion?

A Sure.

Q What's the difference between those two?

A A person's sexual identity is either male or female. Sexual orientation is a term that someone made up to imply something that isn't true.

Q And in the context of this Administrative Procedure Memorandum 3-5, how was the City, to your understanding, using sexual orientation?

A To identify people who are homosexual.

Q And I assume you understood that sexual orientation as the City used it in its Administrative Procedure Memorandum 3-5 included homosexuality back in 1996; correct?

A Yes.

Q And you understood that back in 1996?

A Yes.

Q And you may not have agreed with that; correct?

A I don't agree with it, no.

Q What's your disagreement?

A That it's a false idea. There's no such thing as sexual orientation outside of someone being sexually oriented toward male or female. You're born male or female. That's how you're oriented. Basically there are people who have politically and otherwise, you

* * *

[43] or allowed, which I agree with it.

Q You'd agree that it's important to not have harassment in the workplace; right?

A Yes, I agree. I'd agree with that, right.

Q Is there anything about Administrative Procedure Memorandum 3-5 that you do not agree with?

A Again, this set before me now is not the entire part. The part I'm questioning about is that last part where it tells what the state law is, what it says and what it means, and my question was the way it's applied. It's basically – they take the state law that talks about sexual harassment, and it defines what that is and applies it to a number of things that don't apply, as far as I'm concerned. And this didn't specifically address harassment, I guess in my mind, specifically enough.

Q Is it a legitimate policy of the City to not want harassment in its workplace?

A It's a legitimate policy, yes.

Q The problem?

A The problem is what the City means by that.

Q Is it important, as far as you know, to not have harassment in the workplace?

A Again, yes, depending on what your definition of harassment is.

[44] Q Is it important to a firefighter that there not be harassment in the workplace specific to firefighters?

A Yes. Depending on what your definition of harassment is, yes.

Q Well, you understand the City's definition in 3-5 that we're talking about; you understand that?

A Again, the City doesn't define it well enough for me to make a determination under that. That was my question. I don't think – the City's policy doesn't specify

what it is, and I think they do it purposely. That's why I disagree with it. As a matter of fact, I know they do.

Q Well, who put together Administrative Procedure Memorandum 3-5?

A It came from the mayor's office, but I know the Affirmative Action and a number of people have input on it. I know what their intentions are, and basically we have something that's not too specific. That way you can't have loopholes in it. You make it broad enough where it can cover a number of things.

Q Who was involved specifically in putting together Adminstrative Procedure Memorandum 3-5?

A I know the Affirmative Action Office had input in it, Kirbie Mack and Nance Curtis, yes. I think Kirbie personally, and I've known her for 16 to 17 years.

* * *

[47] harassment; is that fair?

A Say that one more time.

Q In addition to objecting to sexual orientation being included at all in this memorandum, you also objected to what would constitute harassment?

A Yes.

MR. DEAN: Excuse me, I renew my objection. Just to make this more efficient, could we stipulate that there's a standing objection to this line of questioning?

MR. MODL: Yes.

MR. DEAN: You may answer.

MR. MODL: I think there was an answer.

Q You said yes to that question; correct?

A What was the question?

MR. MODL: Why don't you read the question back.

(Question read)

A My objection, again, the fact that it did not – it was specified what harassment was. That's my problem, and that was my objection. It's not included. It's not – to me it wasn't clear enough.

Q I'm showing you Exhibit 3 to your deposition. This is a copy of some of the work rules of the City of [48] Madison Fire Department. You received a copy of the City of Madison Fire Department Work Rules; correct?

A Yes, sir.

Q And you received those when you were in the academy?

A Initially, yes.

Q And the rules were explained to you at that time when you were in the academy?

A No.

Q Were the City's work rules, City of Madison Fire Department's work rules ever explained to you?

A No.

Q Did you ever have questions as to what specific work rules meant?

A Yes.

Q Did you address those questions to someone?

A Yes.

Q Why don't you tell me about that.

A I can't recall specific, specific incidents. But there had been a number of cases over the years where a rule's violation would come and up and they questioned someone about it. They would give you the rule and you basically asked – basically find out why there's – that is a violation as to what the rule meant. But I mean there are no specific rules at a specific time I can remember. But there have been [49] over the years.

Q So is it fair to say that the only times you raised questions as to what the fire department's work rules meant was when one of these work rules was being enforced against you?

A No. I didn't say that.

Q Okay.

A It doesn't matter, enforced against me or someone else. There's some rules you are aware of because they're just common sense things, you know. They are a rule. I couldn't quote specifically. You know the rule, what it said, what it means. You look it up and then discuss what it means.

Q Did you periodically receive new copies of the fire department's work rules?

A I don't believe so. I think I received probably one in training, just a guess. But I'd say probably one or two updates since the training.

Q If there were changes to any of the work rules, you would receive those changes?

A I don't think I received them personally. I think there is a copy sent to the station. You know, we have – there's a bulletin board, things posted on, changes, and then there's a book those changes go into.

[50] Q Was there a copy of the work rules that were available at the fire station where you were stationed?

A Yes, I would say so. I'm pretty sure there was one in the office, yeah, that I had possession of it.

Q If you ever needed to see a copy of the work rules, were they available to you?

A Yes.

Q If you had any questions about what a work rule meant, was there somebody available to answer those questions?

A Whole crew of people.

Q That would include the fire chief?

A Yes. But basically anybody could give their opinion on it.

Q If you had a question as to what a particular work rule meant, you could ask the fire chief; correct?

A Yes. One of the division chiefs were readily available to you, yes.

Q If you had a question as to what a rule meant that may relate to personnel, could you ask the assistant chief for personnel?

A Yes.

Q Was there any limitations ever imposed on you to who you could ask questions to as to the meaning of these work rules?

* * *

[53] A Yes.

Q Do you have an understanding where that's at in the court systems?

A Not really. I asked my lawyer.

Q Other than your discharge, any other discipline you've received other than what we've talked about?

A At the moment I couldn't recall anything. I'm sure if I could get a copy of my thing, I could probably go through it. But off the top of my head –

MR. DEAN: I can advise you if you want.

MR. MODL: Sure. Are there any others?

MR. DEAN: On the appeal of the '96, '97, it is in circuit court right now before Judge O'Brien. And just one small clarification. It was not a total 90-day suspension. It was two-month and one-month concurrence, so an actual 60 days served.

Q Do you have before you what's been marked as Exhibit 1 for your deposition?

A Yes.

Q What is that?

A It's a letter I sent out to the media.

Q This is the news release that's the subject of your [54] termination; is that fair?

A Yes, sir.

Q When did you prepare this?

A I don't know. Probably – it doesn't have the fax across the top anymore. I'd guess – I'd say April, May of '96, '97 – '97? Yeah, '97. So probably somewhere around April or May, I guess, somewhere in there.

Q Did you prepare it on the same day that you faxed it to the press?

A I'm not sure. I believe I did, but I couldn't say for sure.

Q Do you recall where you were when you prepared this?

A In my office.

Q At home or at work?

A At home. It's a church office in my home.

Q Did you prepare this on a word processor?

A Yes, uh-uh, uh-huh.

Q Exhibit 1 is the final version that actually went to the press; correct?

A It's the only version, yes.

Q That's what I was going to ask. Did you prepare any other versions that you changed?

A No.

Q Did anybody review Exhibit 1 prior to the time you [55] faxed it to the press?

A No.

Q Did you ask anybody to look at it?

A No.

Q Who did you send this to?

A I'm not completely sure. I know Capital Times, State Journal, but I'm not sure who else got a copy. I have a media group on my computer, and I don't know if I sent it specifically to those papers or sent it out to all the groups. I know Capital Times did a story. And it may have been their story or the State Journal's I was responding to, but I don't recall. So I couldn't say for sure, no. It may have been the TV station's, the radio station's – I mean newspaper's. Or it could have been just those ones that I got a copy back from.

Q Is there any way to determine how widely you disseminated this news release?

A No, not that I know of. Ask each one of them maybe, but I have no way of knowing that, no.

Q Looking at your computer, is there a way to determine how widely it was disseminated by you?

A No. Let me explain this. My computer is connected to a fax machine, and I do the word processor.

Well, at the time the computer was – I had a link between that

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[58] published?

A No.

Q Nobody ever told you they saw an article or letter by you in the press?

A No, other than reporters would call and ask about things they got. They would discuss them, and they may do something or a story on something or comment. But as far as them publishing something I did, I don't ever recall seeing anything that I wrote. I mean up until recently, but not before.

Q Prior to the time you sent Exhibit 1 to the media, no individual had come up to you and said, "Ron, I saw in the State Journal," for example, "a letter to the editor you wrote"?

A No. People had said I saw you in this story, and they talk about this story. Nobody has ever said I saw a letter you wrote to the press.

Q In sending Exhibit 1 to the press, you understood there's a chance that they can publish some or all of this; correct?

A Oh, yes, yes.

Q And you had no objection to them publishing this; correct?

A No.

Q Not correct?

[59] A I had no objections to it, no.

Q And you never told the press that you did not want them to publish anything in Exhibit 1, did you?

A No, I didn't.

Q And even today you don't have any objection to the press having done an article based on your news release you provided, do you?

A No.

Q Mr. Greer, the news release says, "Homosexual Chief Rewards Homosexual Chief for Assault?" Do you see that?

A Yes, uh-huh.

Q Who's the homosexual chief you're referring to at the beginning of that line?

A It's the –

Q Who are the people?

A Chief Amesqua and Chief Holtz.

Q So this would be Chief Amesqua rewards Chief Holtz for the assault; is that who the personalities are?

A Yes. It's basically a question.

Q Had Chief Amesqua told you she was a homosexual?

A No, sir.

Q To your knowledge, had Chief Amesqua ever publicly acknowledged that she was a homosexual?

A Well, verbally, no.

[60] Q Did Chief Amesqua authorize you to make this sort of statement accusing her of being a homosexual to the press?

A Authorize? What do you mean by that?

Q Did she tell you it was okay for you to make such a statement?

A No. Why would she? I don't understand the question.

Q Did you ever –

A How would she authorize me to do something? I don't understand what you're saying. Explain the question again.

Q Did – strike that. Did you ask Chief Amesqua if you could make this kind of disclosure to the press about her?

A No.

Q Did Chief Amesqua ever say to you, "Mr. Greer, it's okay with me for you to go to the press and state to the press I'm a homosexual"?

A No.

Q Has Chief Amesqua, to your knowledge, ever stated publicly that she's a homosexual?

A Not that I know of, no, at least not in my presence.

Q You don't like homosexuality; correct?

A I don't like homosexuality? What do you mean I don't like –

* * *

[63] homosexual or a lesbian?

A No. She said partner. I mean my assumption is if somebody says it's their partner, then – I mean she didn't say they were business partners.

Q Did you ask her what she meant by partner?

A No.

Q Did you ever discuss with Chief Amesqua this conversation you had?

A No.

Q Did you ever ask Chief Amesqua if she was a homosexual or a lesbian?

A No. I asked her how she would overcome the opposition to her being homosexual and being chosen over someone who they thought was more qualified and also the fact that she had come from a place and volunteered and had no show of experience. All those questions were asked the first day she got here. She simply said her sexual activity or orientation wasn't relevant to her doing her job.

Q Is that something she said to you?

A Me and a group of people in the meeting. She said it to all of us. And she's made similar statements twice in my presence.

Q So at least two times she told you her sexual orientation, whatever that is, is irrelevant to her [64] doing the job?

A She said her sexual orientation and sexual activity are irrelevant to her doing the job. She didn't say whatever it is. She simply stated it had no bearing on how she performed her job.

Q Do you agree with that?

A Not really, no.

Q What's your disagreement?

A Being heterosexual in itself – homosexual doesn't – being homosexual doesn't affect someone's physical performance of their job in her position or in her position of leadership. If your sexual activity, your sexuality thing or any other character issue becomes an issue in leadership when you are in charge of a unit where you're respected – your leadership abilities and your character is important. And fire service, that's one of the places where people need to respect you and at least feel confident that you're able to do the job and you're trustworthy. If your character becomes an issue, then the trust breaks down. The trust breaks down more, and how people respond breaks down. And the firefighter – when that happens, people get hurt or die.

Q Is character associated with whether or not somebody is a homosexual?

[65] A In my mind, yes. Most people I know, yes.

Q What's the association in your mind?

A Homosexual activity is a perversion, and usually sexual perversion is related to someone's character whether or not they're a good character or not. If someone is involved in pedophilia or some guy sleeps around with different women when he's married, it's a character issue.

Q So if somebody is a homosexual, in your mind, that reflects negatively on their character?

A Yes.

Q Is that something that you've publicly stated, I assume?

A A number of times, yes.

Q It's something that you stated prior to the time you sent out this press release marked as Exhibit 1?

A Yes.

Q Have you said that to people at the fire department?

A Yes.

Q Have you made those statements to individuals at the fire department prior to the time you sent out this news release?

A Yes. Now, my beliefs, my religious belief and faith about how that affects – I mean it's never been a secret. I'll put it that way.

[66] Q Do you believe that Chief Amesqua is a poor leader because you claim she's homosexual?

A I think she's a poor leader for a number of reasons. One aspect of that is her character. People don't –

firefighters in particular – don't necessarily trust her because of her – that one aspect of her character. But there are a number of other reasons why, also.

Q Is one aspect of her character that you're talking about your belief that she's a homosexual?

A Yes. The question was what I thought everybody else thought. Is that what you were getting at?

MR. MODL: Why don't you read him the question back before the last one. (Question read)

A So I kind of went out too far, but anyway.

Q So if I understand your testimony, it's your testimony that if somebody's a homosexual, that negatively reflects their character; correct?

A Negatively reflects on their character, yes.

Q And character is important for leadership in the fire department; correct?

A Yes.

Q It's one of the qualities that's important?

A Yes.

* * *

[68] mainly the conversations that have not been initiated by me. I had commented on other people's opinions about it.

Q Homosexuality, is that a perversion?

A Yes.

Q And that's an opinion you've expressed to others?

A Sure.

Q That's an opinion you've expressed prior to sending out the news release, Exhibit 1?

A Yes.

Q And I assume that's also a view you've expressed subsequent to sending out Exhibit 1, after?

A Oh, yes.

Q You said that you were at Chief Amesqua's swearing in ceremony.

A Yes.

Q And as I understand –

A Excuse me, take that back. The incident at the fire station with her, the announcement of them hiring her. The swearing in ceremony is actually different. I mean I was at the fire station the day that they announced who the new chief was, and she was there for a press conference. That wasn't swearing, no. That was a different ceremony altogether. I was at both those actually.

[69] Q Who was there for the press conference that you just talked about?

A That would be Brenda Pfeiler, the president of the Police and Fire Commission. And if I recall, there were at least two other commissioners there, I think. There was the senior staff chief officers. There were a number of firefighters, off duty, and then people were – there were

on-duty firefighters. Kirbie Mack was there from the Affirmative Action Office. I think Nance Curtis was there, also. That's the best I can remember. There were some other people there, but most of the people I recognize.

Q Were you present at that press conference because it was at the station where you were stationed?

A I was there because I was stationed there that day and just my interest, also. I mean everybody was wondering who the new fire chief was going to be. We all sort of knew, but that was the first day they actually announced it.

Q Were you on duty that day?

A Yes.

Q So did you attend that press conference to hear what the announcement would be?

A Yes.

Q When you heard the announcement that it was Chief [70] Amesqua, did you have a response to that?

A Response as what? You mean –

Q Did you verbalize any response to that announcement?

A When the reporters talked to me, yes, later, but not at the press conference, no.

Q Was that the same day the reporters talked to you?

A Yes.

Q What did you tell reporters that day?

A Well, that I was concerned about the process. I was concerned about the qualifications of the candidate there and that I felt that the Police and Fire Commission may have very well engaged in something that was illegal. And I –

Q What did you mean by that, engaged in something illegal?

A They hired someone that was not qualified, and they purposely overlooked other qualified candidates.

MR. DEAN: I think the term was illegal rather than legal.

A They did something illegal I thought. Illegal to hire her.

Q Did you believe that – strike that. Did you state on this date of this press conference that you believed the Police and Fire Commission considered Ms. Amesqua's sexual orientation in the hiring?

* * *

[72] assumed also that she was a lesbian just as they were.

Q At the press conference that we've been talking about, did you make any statements, anything negative to Ms. Amesqua –

A To her, no.

Q – about her?

A No. Not that I saw was negative, no.

Q Did you – were you critical of the decision to hire her?

A Oh, yes.

Q Did you believe that Ms. Amesqua was competent to be fire chief?

A No.

Q Did you believe Ms. Amesqua's sexual orientation and the character flaw that you associate with that was one of the reasons that she was not competent?

A I believe then and believe now it would be a factor that she would have to overcome in that case. It would be a problem, yes. But did it I believe in and of itself prohibit her from doing her job, not physically. Personally, no.

Q Did you believe that if Ms. Amesqua was a homosexual or a lesbian that that – strike that. Did you consider homosexuality a character flaw?

A What do you mean – yes. If you mean that I think it [73] reflects poor character, yes.

Q Did you believe at the time of this press conference that this character flaw would somehow impede the chief, Chief Amesqua in doing her job?

A Effectively, yes. That was my question to her, as to how she would overcome that.

Q After the hiring decision was announced at this press conference, had you made any other statements critical of Chief Amesqua's leadership?

A Yes.

Q And is there a way, Mr. Greer, to quantify the number of times you've done that?

A No. I couldn't begin to remember that.

Q Between the time of the announcement of the hiring decision and the date of your termination, July 31, 1998, would you say you've been critical of Chief Amesqua in excess of 50 times?

A I have no way of knowing. To guess, technically I'd say – well, yeah, you could say more than 50 times.

Q And would your criticisms of Chief Amesqua have included being critical of the fact that you believe she was homosexual?

A No.

Q No?

A No.

* * *

[75] So, yes, it includes her, but I never made that specifically about her.

Q You've made statements about your views on homosexuality; correct?

A Yes. I think it's sinful. It's destructive to the individual and as well as that society accepts it.

Q Have you made statements publicly that you believe people who are homosexuals should be discriminated against in jobs?

A Yes. On some level, yes.

Q And you've made statements that in your belief homosexuals should not be allowed to hold positions in authority; correct?

A Explain that again now. Say that one more time.

Q Have you made statements that you believe homosexuals should not be permitted to hold positions of authority?

A Yes. In some cases, yes.

Q Is it your belief that that would include positions such as a fire chief for a metropolitan area like Madison?

A Yes, sure. If that's going to affect her on a job, yes.

Q Did you express views that you believe homosexuals molest children?

[76] A Yes.

Q Are these all views that you've expressed prior to the time you sent out Exhibit 1, your press release?

A At some time probably, yes, but not publicly, no. I don't recall doing it publicly, but I may have.

Q Well, there are views that you've expressed to other people such as firefighters; correct?

A Yes. The views I've discussed with the firefighters, I mean it's not like I expressed my view to them and then I convinced them that it's true. Usually the conversation is prompted by something they say, and we've discussed the matter.

Q You've expressed views that homosexuals are the cause of human disease; correct?

A No.

Q Never said that?

A No.

Q Are there any other statements that you recall expressing to other people about your views of homosexuality other than what we've just talked about?

A There are countless statements and views. I mean my views, I can't recount them all. I preach every Sunday. I state nationally. There's no way of quantifying that. It's impossible.

Q Are there any other statements that you recall making

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[78] to them emotionally and spiritually, and it's the society that permits that and promotes that. Now, those folks involved in those activities, it is an inflection of bad character, and because of that, people view them differently. And at the same time it is not something that they are born with. It is something that they choose to do. Given no matter what the circumstances are, there are some people who are more prone to be involved than others. But their choices – and I'm saying because it is – they can also refuse and back out and leave that lifestyle and stop doing that activity. But at the same time sexual – homosexuality is no different from any other sexual activity out of marriage. It is sinful. It is all a perversion of what God intended. That's to put it in a nutshell.

Q Exhibit 1, the news release, you refer to chief – or Division Chief Marcia Holtz as a homosexual; is that correct?

A Yes.

Q Has Division Chief Marcia Holtz ever given you permission to disclose to the press or to the public that she's homosexual?

A Again, I don't understand that question. Because how does someone give you permission to say something that [79] you viewed. If I told someone that Michael is a man, heterosexual because he has two daughters, I mean that's not something you would think about or even give me permission to say. How do you do that?

Q Have you ever asked Chief Holtz if you could disclose to anyone her sexual orientation?

A No. I don't understand the question. Why would I ask that? I don't understand the relevance. I don't know how that makes sense.

Q Has Chief Holtz ever stated to you that you have her consent to disclose her sexual orientation?

A No.

Q And that means to anyone; correct?

A What?

Q Chief Holtz has not authorized you to discuss her sexuality orientation with anyone; correct?

A I have to say correct because the question doesn't make sense to me. I mean she has never said, "Hey, why

don't you go out and tell everyone I'm homosexual." No, the idea of authorizing me doesn't make sense. There's no such thing as authorizing someone to say, say something that you publicly are. That doesn't make sense. It's like authorizing – it's like for you authorizing me to say that you're a man or you're white or you're five foot whatever or

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[81] firefighter with me.

Q When was that that you had that conversation with her?

A Very early on. We came on together back in the early Eighties.

Q And what was the conversation?

A I couldn't tell you specifically. I know that I have spoken to her and a number of other – I came on the job. There were a number of homosexuals in my class together, and we trained together before we came on together. So I know I've had the conversation countless times.

Q Did Ms. Holtz tell you that she was a lesbian?

A I would assume so, yes.

Q Do you recall if she did?

A Not specifically, no.

Q Your news release here, Exhibit 1, talks about an investigation into this Ron Cato matter.

A Correct, yes, sir.

Q Were you part of that investigation?

A No.

Q Were you present when the incident between Mr. Cato and Ms. Holtz occurred?

A No.

Q Were you asked to be part of that investigation?

A No.

[82] Q Were you questioned as part of the investigation into that matter?

A No.

Q Did you receive a copy of any of the investigation findings?

A Before this?

Q Before you did your news release.

A No.

Q Have you received – strike that. Do you know who did the investigation?

A Yes.

Q Who was that?

A Chief Bill Spohn.

Q And have you spoken with Bill Spohn prior to the time you authored and sent out Exhibit 1 –

A Yes.

Q – about this incident?

A Yes.

Q What conversation did you have with Chief Spohn?

A I don't know specifics. I don't know specifics. But let me put it this way. Each one of the chief officers serve as a chief in charge. That means they are the chief officer in charge of the City for that evening, after work hours, and those chief officers, they reside at the station where I work. So we eat

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[84] What do you recall as to the content of those conversations with Chief Spohn regarding his investigation of the Cato matter?

A In general, I can't – I mean I can't specifically tell you what we discussed. I can tell you that the conversation wasn't very long with Chief Spohn.

Q And it wasn't very long because he wasn't going to disclose specifics; correct?

A Yes, or certain specific things he wouldn't reveal.

Q Did he reveal to you who he spoke with in doing his investigation?

A Not specifically, no, and generally, yes.

Q Did he reveal to you what anyone had said to him in the course of his investigation?

A I don't typically recall the specifics, no.

Q Did he advise you as to what conclusions he had come to?

A No.

Q Did he advise you as to the reasons he came to any particular conclusions?

A No.

Q Did Chief Spohn tell you what recommendations he was making regarding his investigation?

A No.

Q Is there anything else you recall about what [85] Chief Spohn said to you regarding his investigation of the Cato/Holtz matter?

A No. Not right offhand, no.

Q Did you speak with anyone else in fire department management about that investigation prior to the time you prepared Exhibit 1?

A I don't recall specifically who I talked to, any particular one at the time. But I can say generally I know we've talked to – for every chief officer that's been in charge, there's a different one probably each day. So I'm sure that – or in the conversation around the table we've talked about it. That I'm sure of, but I can't say specifically we talked to this chief on this day and had this conversation with him.

Q Has anyone told you prior to the time you prepared and faxed to the press Exhibit 1 specifically what occurred during the investigation of the Cato/Holtz matter?

A Say that one more time.

Q Sure. Have any of the chiefs that you have dinner or lunch or breakfast with informed you prior to the time you sent out this news release marked as Exhibit 1 any specifics about the investigation into the Holtz/Cato matter?

A Not offhand that I can remember; not specifically

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[87] would say if we saw them in the station that day, I'm pretty sure we talked to one of the chief officers about it. There would be no way in the world we didn't.

Q Who did the investigation?

A Chief Spohn.

Q Anyone else?

A I'm not sure who else was involved in it, no.

Q As you sit here today, are you aware of anyone else being involved in that investigation?

A No, not right offhand. Not right offhand, no.

Q What you know of that investigation, are you critical of the manner in which the investigation was handled?

A Critical in the sense that they did it internally, yes.

Q One criticism you have is that an internal person did the investigation?

A Right.

Q Any other criticisms?

A I don't know. The fact that it was done internally, that we didn't see – no one saw the actual investigation. It wasn't available to anyone, anybody. Those would be the two general criticisms.

Q Having done the investigation internally, is that something that's different from normal fire department [88] practice?

A This isn't normal. Something like this never happened before. But given other instances, there wouldn't be anything – it wouldn't have been different in other investigations, if they want to call it investigations, no. I don't recall having an investigation formally. There's never been an incident like this. That's what I'm saying. There have been particular questions and inquiries about her issues, but never anything like this.

Q Who makes the decision whether to have an internal versus an external person doing the investigation?

A I don't know. I assume the chief would or the mayor.

Q Do you know who made the decision in this case?

A I don't know, but I understood the chief made the determination. That's what I was told.

Q Do you know the reasons why the person made the decision to have an internal versus external?

A No.

Q Have you ever discussed with Chief Amesqua any of the findings of the investigation?

A No.

Q Have you discussed with Chief Amesqua what recommendation Chief Spohn made as a result of his investigation?

[89] A No.

Q Have you discussed with anyone what recommendation Chief Spohn made as a result of his investigation?

A Before or after the news release?

Q Before the news release.

A I discussed with people on my shift and the union president and union officers, yes.

Q What discussion did you have with the union on that subject?

A Mainly, specifically what the decision was and, you know, if they have the investigation or they've seen that. In particular, things about what she said in the letter, what the union actions or involvement was or was going to be, those kind of things.

Q Prior to sending out Exhibit 1, had you seen the investigation?

A No. No, I didn't.

Q Prior to sending out Exhibit 1, had anyone told you the bases for the recommendation, if any, that Spohn made?

A Had anyone told me the basis for his recommendation?

Q Yes.

A No.

Q Prior to sending out Exhibit 1, were you aware of what bases the chief had for the decision that she made [90] regarding discipline?

A Ask that again.

Q Prior to you sending out Exhibit 1, did you have knowledge as to the reasons for Chief Amesqua's decision as to discipline in this situation?

A I have reasons about that, but not – no specific information that someone gave me in particular for that investigation or her decisions, no.

Q Have you ever spoken with Chief Amesqua about her decision as to what discipline to impose in the Cato/Holtz matter?

A No. If I have, I don't recall it, so I doubt it very seriously.

Q You seem critical in your release here, that part of the discipline was the six-month extension of probation.

A Which part are you reading?

Q I'm reading the last sentence of the first paragraph. You seem critical that this was imposed as a discipline because Chief Holtz herself had suggested it; is that correct?

A Yes.

Q What's the criticism there?

A That it is highly unusual for someone else to suggest what their disciplinary punishment should be. That's [91] basically unheard of.

Q Have you ever given discipline to someone?

A In the fire service?

Q Yes.

A No.

Q And the basis of your saying that it's highly unusual for a chief to base discipline, at least in part, on a suggestion by the subject of the discipline, why do you say that?

A Well, 17 years, I have never seen it or heard of it.

Q Well, do you hear about every disciplinary action?

A Every one.

Q Why do you hear about every disciplinary action?

A We all hear about it. That's the nature of the fire station. There's very little that goes on that you don't hear about, especially when it goes to this matter. I don't think there's ever a disciplinary matter that people don't know about it.

Q It's a very close group of guys.

A Extremely, guys and women.

Q I use guys generically. It's a Milwaukee term. I take it men and women who are firefighters have to get along.

A Right. We call each other guys, too.

Q Is it critical that there's good work relationships [92] between firefighters?

A Extremely critical.

Q Life and death kind of situation?

A Yes.

Q I mean you, as a firefighter, when you go out on a call, you need to be able to depend on your other firefighters?

A Exactly.

Q And they need to be able to depend on you?

A Yes.

Q If there's questions about whether they can trust you, that's a serious problem?

A Extremely serious, yes.

Q And if you have a question whether you can trust someone, that's a serious problem?

A Extremely, yes.

Q Do you have any questions in your mind when you're out on a call whether you can trust somebody who's homosexual?

A My trust has nothing to do – my trust has nothing to do whether they're homosexual or not. There are some homosexuals I don't trust. There are some heterosexuals I don't trust.

Q Somebody who's a homosexual, does that cause you to distrust their leadership ability?

[93] A I would distrust – have some level of distrust for their leadership ability only in the sense I would question that character, and my trust would be falsified. I'll go that way.

Q Sure. To the extent character influences leadership that you'd have a concern?

A Yes, only in the area of trust.

Q Paragraph No. 2 of your press release, Mr. Greer, you talk about physical and verbal assaults. Do you see that at the beginning of the second line?

A Yes.

Q What verbal assaults were there that you know of?

A Mainly the screaming at him. Just mainly the screaming.

Q What did Ms. Holtz say to Mr. Cato?

A She screamed "Where's your crew? What are you doing? Where's your crew," as best I can recall. The words "your crew" sticks out other than anything else.

Q Is something wrong with the words "where's your crew"?

A Oh, no. No, it's – no, it's not meant to be a question. It wasn't a question to be answered. First, the tone of it and asking the question. His crew, of course, is right there next to her, behind her. There's only three people there; him, her and another person.

[94] Q I'm focusing on the content. You don't have a concern with the content of the question, do you, "Where's your crew"?

A Not particularly, no. I mean the words, no.

Q How do you know that's what she said?

A It's on the videotape, and I heard it. I heard it on the newscast, too.

Q So other than the video report, do you have any other information as to what Chief Amesqua said – I'm sorry, Chief Holtz said?

A Before this or after this?

Q Before you sent out your April 1st – or your April press release.

A I've had conversations with other people who had told me about things that was said and done, but no specific things, no.

Q Prior to the time you sent out the news release marked as Exhibit 1 had you talked to Cato about what was said?

A I honestly can't say. I can't remember talking to him after – or before the news release.

Q Prior to the time you sent out Exhibit 1, had you talked with Chief Holtz about what she had said?

A No.

Q Prior to the time you sent out Exhibit 1, had you

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[99] believe should have investigated the Holtz/Cato matter?

A Me personally? I would have chosen probably the police department or someone like that or maybe even a private firm.

Q Why?

A I probably would have chose the police department.

Q Why would you have chosen somebody other than a chief officer?

A It really wouldn't in my mind make sense because there's too much – there's too much interest on that chief's part, in my mind. Too much pressure on that chief to give information for – to do something that is satisfying to the chief, and then it would be too much pressure on that chief officer from their subordinate – I mean their colleague. To me, if you want to do the investigation to get a sort of unbiased result or opinion, then you do it with somebody who doesn't have an interest one way or the other.

Q Are you aware of any particular relationship between Chief Spohn and Division Chief Holtz?

A They're senior staff members. They're all on the same staff.

Q Other than being staff members, are you aware of any special relationship between them?

[100] A Special in which way? I mean they have contact. They work together. They interact at different

times in their jobs. But other than – you mean a personal relationship?

Q Yes.

A No. Not that I know of, no.

Q Is there any information that you have that Chief Spohn did his investigation in a way that he was influenced by the fact that Chief Holtz was a fellow staff member?

A No. I don't have any information of that. I mean other than the fact that it would be sort of common assumptions being a senior staff member. There would be some influence as a possibility of that.

Q Prior to the time you did your press release, had anybody told you that Chief Spohn was some way improperly influenced in his investigation?

A No.

Q Did anybody tell you that Chief Spohn was improperly influenced in the recommendations that he gave?

A No.

Q Are you aware of any activity by Chief Spohn during the course of his investigation that you think is improper?

A No, other than I think the investigation – him doing [101] the investigation itself was improper.

Q Right, I understand that.

A Not myself doing anything improper, no.

Q Are there people that Chief Spohn should have spoken with, in your opinion, that he failed to speak with?

A Again, I don't know. Not to my knowledge.

Q Because you're not sure who he even spoke with, are you?

A Not before I wrote this, no. I have since learned who he spoke to from his report, or parts of it rather.

Q Page 1 of your press release, fourth paragraph down. The last statement here is, "Or could the conclusions of the investigation be simply disregarded without opposition by that subordinate." What does that mean?

A "Or could the conclusions of the investigation be simply disregarded without opposition by that subordinate." Let me go back. "The investigation was done by another division chief who is a subordinate to Chief Amesqua and a staff member with Division Chief Holtz. Is it possible that the investigating officer could have been unduly influenced? Or could the conclusions of the investigation be simply disregarded without opposition by that subordinate?" And in that sense, could Chief Amesqua make a decision about the results of the investigation and completely

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[104] She's also authorized to put things before the commission, at least that's my understanding. Now, in that sense, the mayor can make certain decisions. There's also the political factor.

Q Can the mayor discipline firefighters?

A My understanding is yes.

Q Can the mayor discipline an assistant chief?

A Sure. That's my understanding. The mayor can fire an employee. That's discipline.

Q Can the mayor have fired you?

A I understand – as I understand it, yes. I mean the mayor is my boss. I mean technically he's the boss, or she is.

Q In your news release here you say that Women in Fire is a predominantly homosexual organization; is that right?

A It's viewed and perceived by most firefighters in this area as being a predominantly lesbian organization.

Q Is that how you view it?

A Yes.

Q Is that how you viewed it at the time you wrote Exhibit 1?

A Yes.

Q Is that a criticism you have of that organization?

A No. It's an observation.

[105] Q I'm at the bottom of paragraph 5 on page 1. You have a statement here, "Is it possible that some favoritism has been shown to a fellow member or possible friend?" Do you see that?

A Yes.

Q Is it your suggestion in raising that point that Chief Amesqua may have some favoritism to Chief Holtz based on homosexuality?

A I would say that – in my mind there's a possibility that she showed favoritism based partly upon the fact that they're both lesbians.

Q And that's the suggestion you're communicating in this news release with that sentence; correct?

A No. With that and the fact that they have a friendship between the two.

Q Sure. They're two different points; correct?

A Yes.

Q One issue is whether she's showing, she being Chief Amesqua, showing favoritism based on friendship; correct?

A Yes.

Q And the second suggestion you're making is is Chief Amesqua showing favoritism based upon homosexuality; correct?

A Let me go back. There were three things, their [106] friendship, their membership in the organization and about the homosexuality as well, yes.

Q Are three of those things suggestions you're raising as to why Chief Amesqa may have shown favoritism?

A I'm just asking the question and the fact it's the reasonable question to ask. I mean is it possible that

that's the case? I'm saying these questions weren't raised, and they should be.

Q Why don't you listen to the question because this is what the question is. In your press release, that statement we've just talked about, that being is it possible that some favoritism has been shown here to a fellow member or possible friend?

A Yes, sir.

Q Is one of your suggestions in that being whether Chief Amesqua showed favoritism to Chief Holtz in discipline based on homosexuality?

A Again, the statement isn't suggesting anything. It's simply presenting the possibility.

Q Is that one of the possibilities?

A That's one of the possibilities, yes.

Q In the next paragraph, which is the final paragraph at the bottom of page 1 of Exhibit 1, you referenced "Both are homosexual women who have been seen in the past, and still now among many, with clear agendas."

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[108] their ideas about women and leadership and how much better that is than men leadership positions. I know that also to mean that's something that Marcia has been doing and pushing for ever since we've been on the job. That's radical to me, and that's implied, yes.

Q I've asked you specifically about the homosexual portion of it. You view that as part of the agenda of the Women in Fire Service to advocate for homosexuals?

A Yes.

Q And do you oppose that?

A Yes.

Q And later in this paragraph you referenced the radical agendas. Do you see that?

A Uh-huh.

Q Yes?

A Yes, I'm sorry.

Q The radical agendas refers to, at least in part, advocating for homosexuality; is that fair?

A I'm not understanding that question.

Q Sure. I'll rephrase it.

A Go ahead, I'm sorry.

Q The sentence talks about their radical agendas; do you see that?

A Yes.

[109] Q When you talk about their, are you talking about Chief Amesqua and Chief Holtz?

A Yes.

Q And is part of the two chiefs' radical agenda to advocate for homosexuals?

A I would say, yes.

Q What else is included in the radical agendas of these two fire officers?

A Advocating for women and also advocating a change in philosophy and attitude toward fire service.

Q What's that change in philosophy?

A That our – for instance, in the past what makes a good firefighter is courage and strength and agility and coordination; whereas, in my conversations with Marcia and people or friends with her in a certain group, they, and Chief Amesqua also, their idea has more to do with your attitude and – not attitude, but your ability to get along with certain people, your attitude towards individuals, and that's more important than the agility, strength and that sort of thing.

Q I have now turned the page over which is the second page of your press release here, news release.

A Yes.

Q The first paragraph you're referencing a situation, [110] second sentence, "It's not okay to communicate verbally my views on a department chief officer's handling an issue." Do you see that?

A Yes.

Q What are you referring to there, Mr. Greer?

A It's not okay for me to talk about Chief Amesqua's handling of certain incidents, but it was okay for her to physically abuse someone.

Q And what are you talking about handling that you're referring to here?

A Now that you mention it – I would assume Chief Amesqua handling the situation involving my case before

– I would assume that I meant – I'm not quite sure all of a sudden.

Q At the time you did this press release, this document, Exhibit 1, you had pending before the Police and Fire Commission the suspension issue; correct?

A Yes, sir.

Q And you had not received a decision on that yet; correct?

A No.

Q Not correct?

A That's correct, I'm sorry.

Q And is this reference in the first paragraph on page 2 of your news release, is that referring to your [111] disagreement with Chief Amesqua that resulted in that PFC proceeding?

A Say that one more time.

Q Sure. Is paragraph, the first paragraph on page 2 of this release, is that referring to your disagreement with Chief Amesqua that led to that PFC proceeding?

A I would assume that, yes.

Q And you say that the department and City is willing to spend thousands on a case of an alleged comment without proof.

A What comment are you talking about? Right now I don't recall.

Q Is that comment –

A Comment on proof? What comment?

Q Was that comment –

A Let me think about that. I don't recall.

Q Was that comment part of your suspension case?

A The case was involved –

Q You don't recall?

A I don't remember that.

Q Is it likely that this comment without proof that you're referring to is some dispute, whether we recall which one it is, that you had with Chief Amesqua?

A I don't know. I would assume that, yes.

Q And the next part of that sentence talks about an [112] alleged harassment without a complaint or proof. Do you see that?

A Yes.

Q Is that referring to a dispute that you're having with Chief Amesqua?

A Again, I would assume, yes.

Q And is that the allegation that's part of the suspension proceeding that's going on at this time?

A Again, I would assume so.

Q Because you were being accused of harassment in that proceeding; right?

A Right, uh-huh.

Q Yes?

A Yes.

Q Then there's a discussion again in this first paragraph on page 2 of an alleged rule violation. Do you see that?

A Yes.

Q And that is, again, a disagreement that you're having with Chief Amesqua?

A Again, yes. I would assume so, yes.

Q And you believe that to be referring to the suspension proceeding that's in front of the Police and Fire Commission at this time?

A Again, I would make that assumption, yes.

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[115] Q What's your intent in this paragraph?

A It's basically the idea of that here are incidents that have taken place that are far less serious than what's taken place before, and the discipline is far more harsh than what was given to Chief Holtz.

Q Do you know the circumstances around Mr. Cato being terminated?

A I know what I've been told by the training chief – I mean the assistant training chief, Chief Knudtson and one of the training officers.

Q Why was Cato terminated?

A I haven't got that yet. That's the problem.

Q You're not personally investigating that, are you?

A Not investigating. I questioned both Chief Knudtson Captain Olson, Captain Willauer. I've talked with a number of people and the union in trying to find out specifically why he was terminated, and so far I've never received an actual reason as to why.

Q Are you still pursuing that?

A No.

Q Do you know whether Mr. Cato brought any kind of legal action?

A As I understand it, he has since then, yes.

Q Do you know how that's been resolved, if it has?

A No.

[116] Q Fair to say that your news release, Exhibit 1, is critical of Chief Amesqua's disciplinary decision of Ms. Holtz?

A Including, yeah, handling the situation altogether. Are we at a point where we can take a break?

Q Sure.

(Recess)

Q After you provided Exhibit 1, the news release, to the press, did you then learn that there was an investigation into that matter?

A Say that one more time.

Q After you sent Exhibit 1 to the press, sometime in April of 1997, did you learn that the fire department was investigating that conduct?

A Oh, you mean the letter itself? Oh, after that, yes.

Q How did you learn that there was an investigation into the conduct in sending that letter?

A I don't recall specifically. I would assume that Chief Saxe called me.

Q Was Chief Saxe the individual who was investigating?

A Yes.

Q Do you have any complaints about the selection of Chief Saxe as the investigating officer?

A No.

Q You didn't have any – there was no bad blood between

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[118] because you aren't allowed to ask any questions or present anything. So I had a problem with the whole process altogether.

Q What does that mean that Chief Saxe assumed that you had lied; lied about what?

A When I first met with him, his questions, the things he said assumed that I had lied about, you know, something. I'm not sure exactly what I lied about, but he didn't seem to be specific about that either. But the assumption was from the question that I had lied.

Q What is it that led you to believe that there was a question about whether you lied?

A His questions and his conduct.

Q What is it that led you to that conclusion?

A I can't tell you right offhand right now. I know that my impression was the fact that he was implying that I was lying, and that was part of our interchange in the conversation.

Q Did Chief Saxe ask you if you had prepared this press news release, Exhibit 1?

A I can't say specifically. I'm sure he did, yeah.

Q And you acknowledge that you did it; right?

A Yes.

Q Did Chief Saxe ask if you provided a copy of this to [119] any media?

A Yes.

Q And you acknowledge that you did; correct?

A I would assume that, yes.

Q Is there something in the content of Exhibit 1 that you believe Chief Saxe believed to be a lie?

A Well, again, that's my assumption. Something about what I said was assumed to be false.

Q Do you have any idea, as you sit here today, what it is in the content of Exhibit 1 that you believe Chief Saxe thought was untrue?

A No. I don't remember that.

Q Chief Saxe at some point held a predetermination hearing, correct, relating to this matter?

A That was, as I understand it, the predetermination hearing.

Q Do you know what investigation Chief Saxe did other than meeting with you?

A Other than talking to the reporter and having the other chief officer talk to someone – I'm not sure what that was. But I, again, in my mind, as it was presented to me, as I recall, I was there to ask any questions as part of the investigation. His investigation involved that hearing, and then he makes a recommendation to the chief. That's all it included [120] in the investigation.

Q Part of the investigation is talking with you; correct?

A Right. The so-called predetermination hearing is part of the investigation.

Q What else was involved in Chief Saxe's investigation other than talking to you and someone talking to the reporter?

A Again, him talking to the reporter and having another chief officer to talk to other individuals. Now, who they talked to, I don't know. And it was whoever my chief officer who was over, I guess, my station. I don't recall who was sitting there. I think it was Aldworth. I'm not sure.

Q Have you ever learned who all were talked to regarding this matter?

A No. That's another problem I have with the investigation.

Q To your knowledge, are there people that you think should have been talked to that were not talked to in this investigation?

A Right offhand, right now I couldn't tell you. But I mean give me some time, and I'd probably think of other people, yeah. With you right now I couldn't sit here and say, yeah, she talked to this person, that

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[124] A Yes.

Q Is that your recollection of who was there?

A Yes.

Q Anybody else there?

A Not that I recall, no.

Q Were you given the opportunity to have legal counsel represent you if you chose?

A No, I don't recall, no.

Q You don't recall being given of choice of having legal counsel or a union represent you?

A Lieutenant Conway was a union rep, yes.

Q Were you given the opportunity to have one or the other or both be present on your behalf?

A Again, no. I brought Lieutenant Conway with me, and basically the discussion was that he was going to be in there with me.

Q Was there any objection to him being in there with you?

A Not that I recall. There was a conversation, but I don't recall any objection to it. He was the union president.

Q It's standard practice that there's a union representative present at the predetermination hearing; correct?

A Pretty much so, yes. You mean if you choose to, they [125] can't say no?

Q And nobody said no in this case?

A No. Not that I recall, no.

Q So at the predetermination hearing, I understand you're asked a series of questions; correct?

A Yes.

Q And you answered those questions?

A The best I could, yes.

Q Did you have an opportunity to tell your side of the story?

A No.

Q Why do you say that?

A Because I didn't. He asked me questions. I answered the questions. That was it.

Q I understand you wanted to ask some questions back; correct?

A Yes.

Q You weren't permitted to do that; right?

A No.

Q Were you permitted to make whatever statements you wanted to make regarding this matter?

A Yes, only pertaining to the questions.

Q When you got to the end of the questions, was there a question about, "Is there anything else you wanted to add"?

[126] A Is there anything you wanted to add? Yes, basically it had to pertain to the question at hand.

Q And did you have anything else to add?

A I don't recall. Probably wasn't much of anything other than the fact of saying probably how unfair the thing was and didn't make sense. I recall that being my attitude and my opinion.

Q Understanding that you weren't permitted to ask questions, were you prevented in any way from making any statements you wanted to make at this predetermination hearing?

A Yes. I was told to stick to the questions.

Q And when you got to the last question as to whether or not there was anything else you wanted to add, did they limit what you could say?

A Chief Saxe, as I recall.

Q What did he say?

A He basically said to limit my comments to the questions at hand. I wanted to ask questions about other things and question certain people, and he said, as I

recall, it would have to be pertaining to those questions. I wasn't allowed to talk about other stuff, as I recall.

Q You weren't allowed to ask your own questions; right?

A Right, exactly.

[127] Q But you were allowed to make statements that you wanted to make?

A I was allowed to answer the questions, yes, if my statements pertained to the question. I was allowed to do that. There was nothing there that indicated I was allowed to make statements outside of those questions.

Q And when you're told you can add anything else you wanted to but you can't ask questions, did Chief Saxe limit you to what you could say?

A Again, I don't recall him telling me I could add anything I want. I recall at the end I could make statements or make a general statement about the questions at hand but not add additional stuff, no.

Q Did you do that; did you make a statement about the procedure at the end?

A I don't recall specifically. I mean right offhand I don't recall. I would say I probably criticized the procedure, just knowing me, but to specifically tell you what I said, no.

Q You would have said that you thought the lawsuit was unfair; right?

A I'm pretty sure or something to that effect.

Q Were there things at that meeting, at the predetermination hearing that you wanted to say [128] separate from questions you wanted to ask? Were there things you wanted to say that you did not have an opportunity to say?

A Again, I can't tell you specifically. I'm sure there were, yeah. I mean otherwise I wouldn't have been bothered with not being able to.

Q Did you tell Captain Saxe – or Chief Saxe that there were other things you wanted to say, not questions, things you wanted to say?

A Again, I don't know. I would assume that that was the case; otherwise, we wouldn't have the discussion about saying anything else. If that was part of the conversation, it had to be because I wanted to say some other things. Again, I don't know specifically what it is I wanted to say. I know in general we had the conversation.

Q You don't have a recollection today, do you, of anything that Chief Saxe prevented you from saying?

A No.

Q Did you state at the predetermination hearing that you were familiar with the City of Madison Fire Department rules and regulations?

A I don't recall that, no. I have a general understanding of the rules.

Q At that time in June of '97 you were familiar with the [129] City of Madison Fire Department rules; right?

A Familiar in which way?

Q You knew what they were; you knew what they meant. If you had questions, you knew who to ask.

A If you mean I knew all of the rules and what they were and what they meant, no. Did I have a general idea of common sense rules? Yes. I understood the ones I had been charged with before. I had the knowledge that those existed, yes.

Q You have been charged with being disrespectful?

A Yes. I knew that was a rule. Couldn't think of the number where it was found, but I knew it was a rule.

Q You knew that there was a rule about bringing the department into disrepute; right?

A Yes.

Q Whether you agreed with it, you knew that was a rule; correct?

A It wasn't that I disagreed. I didn't understand it.

Q You understood it to be a rule, though; right?

A I understood that was a rule, yes. But what it meant, nobody understood that.

Q Did you know there was a rule that prohibited harassment in the fire department?

A Yes.

Q You knew that back in May and June of '97?

[130] A Yes.

Q Chief Saxe's memo marked as Exhibit 4 at page 2, the carryover paragraph says that you admitted you had never seen a copy of the investigation transcripts created by Assistant Chief Spohn and that you were unaware of any conclusions reached in the investigation. Do you see that?

A Yes.

Q Is that true? Is that what you would have admitted at the time of the predetermination hearing?

A Again, I believe – I'm not sure. I believe I did. Because I don't recall having any – seeing an investigation report, so, yes, it's true.

Q You don't have any reason to dispute this, do you?

A To be quite honest with you, anything from the fire department I don't trust. If I don't have a recording of it, I don't trust it.

Q You don't have any information, as we sit here today, that would dispute that you did not – that you admitted at this time that you had not seen a copy of the investigation transcripts?

A Say that one more time.

MR. DEAN: I'm sorry, I lost you. Which paragraph are you looking at specifically?

MR. MODL: Strike the question.

[131] Q Do you understand that it would be a violation of the law if Chief Amesqua was making decisions based on somebody's sexual orientation?

A Absolutely.

Q It violates the anti-discimination [sic] law; right?

A Yes.

Q And in your press release, Exhibit 1, are you suggesting that that's, in fact, what Chief Amesqua has done?

A That's a result of it, yes.

Q You're suggesting that in Exhibit 1 Chief Amesqua may have given discipline to Holtz based on her sexual orientation; right?

A Partly, yes.

Q And if that's the case, that would be a violation of state law; right?

A Yes.

Q And a violation of federal law; right?

A Yes.

Q Exhibit 1, your news release here, is this something that, in your opinion, could be embarrassing to the chief?

A Embarrassing to the chief?

Q Yes.

A Could be embarrassing to anybody. It could be.

[132] Q If you're accusing somebody of making decisions based on homosexuality, that can be embarrassing; right?

A I think any legal decision – any legal decision someone makes can be embarrassing, yes.

MR. DEAN: I'm sorry?

A Any legal decision.

Q In the fire department as a firefighter what kinds of things do you do besides fighting fires?

A At the station we mop floors, cook, clean, maintain equipment, clean equipment, inventory.

Q Do you respond to other emergencies besides fires?

A Yeah. Outside of the station we do emergency, medical, water rescues or recovery, hazardous materials response. We do high-tech rescues, trapped holes or that sort of thing, fire inspections, those kinds of things.

Q I assume all of those kind of external activities are the types of things which we talked about earlier where trust between firefighters is critical.

A Yeah. There are emergency situations where you're in a life or death situation. That trust is probably more significant than anywhere else.

Q You tend to work as a team when you do an emergency kind of rescue?

A Yes, always.

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[134] a 24-hour period, and it's not just at night. They're the designated chief in charge that whole day.

Q Between the time Chief Amesqua began as fire chief for the City of Madison and the time you were suspended and ultimately discharged did you have any contact with Chief Amesqua?

A Probably. Maybe outside of the hearings, probably six, seven times. Less than 10 times, yes.

Q And those 10 times, what kind of circumstances would you have contact with Chief Amesqua?

A Different ones. I've had staff meetings with her, say, two or three times. Or basically you're bringing what they call the east side station together, No. 1, and we basically have our meeting with all those crews. That's happened a couple of times. We've been at two fire scenes where I had contact with her. Couple times her coming through the station on her way someplace else saying, "Hi. How are you doing," that sort of thing. And once – a couple times up at the administration office.

Q Anything about any of those, of the 10 contacts, that sticks out in your mind as there being any adversity between the two of you?

A No.

Q When Chief Amesqua would be at a fire scene these

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[136] No, I don't ever remember – that would be completely – man, that would be completely inappropriate. I remember that now.

Q There's a chain of command in the fire department; right?

A Yes.

Q And all firefighters are to respect the chain of command?

A Yes.

Q And respecting the chain of command, I would assume, would be not questioning authority, as a general rule; is that fair?

A You can question some of the authority after you have responded and did what they call you to do. You can question it afterwards. You can question, first of all, whether or not they have the authority to do it. You can question the wisdom of it. You can question anything you want, after you do it of course. There's no freedom of tolerance to disrespect or to question the authority by not doing something that someone in authority had asked you to do.

Q In that level of people following authority like that, I assume you'd agree that that's certainly stricter in the fire department than it is in the comptroller's office; correct?

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[137] A I wouldn't, no.

Q You're a kind of military type organization with the levels of officers; right?

A Yes. In that sense, yeah.

Q And in the same sense as the military. You're to go through chains of command and comply with the directives from your superior; right?

A Well, again, that's the desired process they want you to follow. But unlike the military, it's not a hard, fast rule. For instance, if someone decides that there has been a violation, they've been harassed or discriminated against, and I want to file a complaint, the policy actually directs me to people above me or I can go outside and go to Affirmative Action and go directly to them. Or if I am under a certain officer and that officer in that instance is either the perpetrator or that officer doesn't respond the way the policy said he or she should respond, I can certainly then go to the chief officer – to the chief. So there's a policy where statements are followed; however, it's not a hard fast rule.

Q Sounds like the general rule is you should follow that policy.

A Right, exactly.

Q There may be circumstances that would justify

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[142] the exhibit before the commission did contain a fax saying Evangelical – Trinity of Angelical Church, and that's what it's referring to.

Q You didn't send this as the minister of the Evangelical Church. That wasn't your purpose in sending this to the press, was it?

A I'm a pastor of a church and firefighter, yes.

Q I understand you're a pastor.

A I sent it as Pastor Ronnie Greer and Ron Greer the firefighter. There's no separation between the two.

Q Is there anywhere in this document where you identify yourself other than the fax line, which we don't have, but anywhere in the document, the language of the press release, where you identify yourself as minister?

A No.

Q Is there anywhere in the document where you identify your views are religious views?

A No.

Q Is there some reason you believe that the press, to whom you sent this Exhibit 1, would have believed this to be sent as a pastor and expressing a religious view?

A In my experience, they assume everything I express is a religious view. I don't know. I can't say. I

* * *

[146] press?

MR. DEAN: Objection. It's a multiple question.

Q I'll break that down for you. Have you received any criticisms from firefighters or any comments – strike that. Have you received any comments from any firefighters regarding your views on homosexuality –

A Yes.

Q – which were critical?

A Yes, I have.

Q And what comments have you received?

A Some positive; some negative. Mostly positive. Mostly in agreement. But there have been some who are

critical of my views, yes, but they have been over the years.

Q What negative comments have you received from firefighters since the time you sent Exhibit 1?

A There are some firefighters who didn't like the attention the fire department got because of the attention they got. Whatever that may be.

Q And who was that?

A I don't recall. I've heard the comment a couple times. It's not a normal thing. I have had mostly comments about people who support it.

Q And the negative comments you received from people who

* * *

[149] Chief Amesqua may have acted illegally in her discipline; correct? And that's what we've talked about.

A That's what you characterize, and I'm questioning whether or not that is the case. And I'm saying that there is enough evidence for someone to question whether or not it did or didn't occur.

Q If somebody believes that the chief acted illegally as you suggest may be the case here, is that something that could discredit her as a chief?

A I would think so, yes.

Q You would think so?

A Yes.

Q Is that something that could create problems for her in meting out discipline to other people? Is it a problem for her meting that discipline?

A No. She has sole authority to mete her discipline. There's nobody there that can question what she does or doesn't do. The only one that can question is the Police and Fire Commission and the mayor's office.

Q You're suggesting that she's giving discipline out on an illegal basis of sexual orientation?

MR. DEAN: Objection. That's been asked and answered.

Q With that, I don't want to keep asking about that [150] assumption. Don't you believe that that can affect other discipline that the chief gives out that other people will question her?

A If she is illegally meting out discipline unfairly, then, of course, that will affect the attitudes of other folks about her meting her discipline. Whether she would do it fairly or not – I mean that's if she does it illegal or unfairly. Yes, other people will have difficulty accepting her decisions later.

Q There's been a reference to you picketing outside the swearing-in ceremony. What's that about?

A That was inside. I wasn't outside. I basically went to the Police and Fire Commission hearing, and I stood in the back after about a yard in and held up a sign.

Q This is at the swearing-in ceremony of Chief Amesqua?

A Yes.

Q And you held up a sign?

A Uh-huh.

Q Yes?

A Yes.

Q What did the sign say?

A It said, "When does wrong become right?" One side says, "Injustice is just wrong. Not Affirmative Action," and on the back it says, "When does wrong become right?"

[151] Q I didn't hear the – "Injustice is just wrong. Not Affirmative Action"?

A Yes.

Q What does that mean?

A Injustice is just wrong. It's not Affirmative Action. If we do something unjustly and call it Affirmative Action, it doesn't make it Affirmative Action. It makes it still unjust. It's wrong.

Q You're communicating that you believe the hiring was an Affirmative Action, hiring of the chief?

A Yes. The commission hired her as an Affirmative Action hire, but it was an unjust hiring.

Q An Affirmative Action hire would have been based upon her gender?

A Gender or some identification that hired her by someone with the protective groups.

Q And the protective groups, that would have been sexual orientation; right?

A Yes.

Q And that was one of the meanings of your Affirmative Action sign?

A Say that one more time.

Q Sure. One of the meanings you're communicating with the Affirmative Action sign was that the chief was hired based on Affirmative Action reasons including

* * *

[168] They were passing them out.

Q Are the union meetings on a certain day of the week?

A Yes.

Q What day of the week would that have been?

A I'm not sure. Well, put this way. They are monthly, and I'm not sure when that is. Second Tuesday or first Wednesday or something like that. I don't know.

Q How would we find that out, Mr. Greer, when –

A I can contact the union office. I'm sure they'll have a record of the meeting. Probably they'll tell you what – given the date – what union meeting was after that date or closest to it.

Q As you sit here today, did you have any idea how long you had Exhibit 2 in your possession before you prepared Exhibit 1?

A No.

Q Don't know if it was two days or two weeks?

A No.

Q We talked about following orders being important in these kind of paramilitary organizations; right?

A We talked about respecting authority, yes.

Q At a fire scene or an emergency scene I assume following authority is probably even more important; is that fair?

A Much more important, yes.

* * *

[181] Q Yes.

A I don't know.

Q You're not aware of any?

A No, not right offhand.

Q You say that in this lawsuit you were treated more harshly than other people, other firefighters in the discipline you received; is that right?

A Yes.

Q You told me about Chief Holtz – I assume she's one of the people you consider.

A Yes.

Q Anybody else?

A Not right offhand, no.

Q I'm going to show you Exhibit 8. You don't need to read through the whole thing, Mr. Greer, but is that the offer of proof that you submitted to the Police and Fire Commission in the course of the dismissal proceedings?

A I would assume so, yes. Looks like it. And my signature, yes.

Q I think we're almost done here. What did the bumper sticker on Chief Amesqua's vehicle say?

A Didn't say anything. It's a gay liberation flag.

Q It's a flag?

A Yes. Well, it's a sticker that symbolizes a flag.

* * *

[183] property, including something like that. They have since been removed from other firefighters' vehicles.

Q What's been removed from other firefighters' vehicles?

A Political bumpers – or stickers or bumper stickers or symbols that symbolize sort of political or political preference or whatever.

Q Was that a written rule?

A As I understand it, yes.

Q Have you ever seen it?

A Yes, I saw it. I was shown something that was a copy of a rule or policy. At least I was told that's what it was.

Q It is a rule that's in, for example, the fire department work rules?

A Again, it was on another sheet of paper, quotations on it, and I would assume it's part of the fire department rule or fire department policy.

Q You have Exhibit 6 in front of you. That would be the statement of charges; correct?

A Yes.

Q Attached to that, the last two pages, the backside of one page and then the last page, that's a newspaper article; correct?

A Copies of it, yes.

Q This was an article that ran on Thursday, May 1, 1997?

[184] A Yes.

Q Is this the article that was based upon the news release, Exhibit 1, to this proceeding?

A Yes. It's the same thing, yes.

Q And it quotes from your news release; correct?

A Where exactly? Yes. Some quotes, yeah. Yes, there's one there.

Q The continuation has "Could it be that their radical agenda has come to play." Do you see that?

A Yes.

Q That's from your letter; correct, your press release?

A Yes. Let me look at it first to make sure.

(Witness reviews document)

A Yes.

MR. MODL: That's it. Thank you.

(Adjourning at 1:16 P.M.)

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

RONNIE B. GREER,

Plaintiff,

v. Case No. 98 C 560 C

DEBRA H. AMESQUA, ALAN SEEGER, MARGARET MacMURRAY, BYRON BISHOP, LYNN HOBBIE, MARIO MENDOZA, THE CITY OF MADISON FIRE DEPARTMENT, THE CITY OF MADISON, THE CITY OF MADISON POLICE & FIRE COMMISSION, and ABC INSURANCE COMPANY,

Defendants.

AFFIDAVIT OF CITY OF MADISON FIRE CHIEF DEBRA H. AMESQUA IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

STATE OF WISCONSIN)
) ss.
County of Dane)

Debra H. Amesqua, being first duly sworn on oath deposes and states as follows:

1. I am an adult resident of the State of Wisconsin.

2. I make this Affidavit on the basis of my personal knowledge of the facts set forth herein.

3. At all times relevant hereto, I was the Fire Chief for the City of Madison.

4. I am familiar with disciplinary actions taken by the City of Madison Board of Police and Fire Commissioners ("PFC") against former firefighter Ronnie Greer.

5. Between 1987 and the present, City of Madison fire chiefs have filed with the PFC charges on five (5) separate occasions against Ronnie Greer, alleging violations of various City of Madison policies and City of Madison Fire Department policies and/or rules.

6. Attached hereto as *Exhibit 1* is a true and correct copy of the City of Madison Fire Department Work Rules.

7. In December 1996, I filed with the PFC a statement of charges against firefighter Ronnie Greer, alleging violation of rules of the Madison Fire Department and violation of the City's administrative procedure memorandum which prohibits harassment in the workplace. The conduct giving rise to the December 1996 charges included distribution on Department property of a pamphlet entitled, "Homosexuality: The Truth."

8. The PFC sustained the December 1996 charges and suspended firefighter Greer for three (3) months without pay. The PFC's decision included a two (2) month suspension and a one (1) month suspension, both without pay. These suspensions ran concurrently.

9. Attached hereto as *Exhibit 5* is a true and correct copy of the PFC's June 25, 1997 Decision and Order.

10. In October 1996, I learned about an incident which occurred during a training exercise at the Firefighter Academy involving Recruit Cato and Division Chief Holtz.

11. This incident involved physical contact between Division Chief Holtz and Recuit [sic] Cato.

12. I assigned Assistant Chief Spohn to investigate this matter.

13. Spohn conducted an investigation and provided a report and recommendations to me.

14. I reviewed Assistant Chief Spohn's report and the file in this matter.

15. It was my conclusion, based upon the investigation, that Division Chief Holtz' conduct was not unreasonable under the circumstances. I did extend Division Chief Holtz' probation six (6) months and required that she attend leadership school as a result of the October 1996 incident.

16. On or about May 1, 1997, I became aware of Greer's "news release" and a newspaper article which appeared in the *Capital Times* newspaper which was based upon the "news release." Attached hereto as *Exhibit 4* is a true and correct copy of the newspaper article, which is attached to the July 28, 1997 Statement of Charges.

17. I assigned Assistant Chief Saxe to investigate Greer's conduct in providing the offensive "news release" to the press.

18. Assistant Chief Saxe completed his investigation on or about June 5, 1997, and prepared a report and recommendation which he forwarded to me. Attached hereto as *Exhibit 3* is a true and correct copy of the June 5, 1997 report from Saxe to Amesqua.

19. Assistant Chief Saxe recommended that the employment of Greer be terminated.

20. I reviewed Chief Saxe's June 5, 1997 report and the file in this matter.

21. In correspondence dated June 10, 1997, from Amesqua to Greer, I informed Greer that based upon Greer's conduct regarding the content and distribution of the "news release" to the press, I had concluded that Greer's employment with the Department should be terminated. Attached hereto as *Exhibit 2* is a true and correct copy of the June 10, 1997 correspondence.

22. I provided to Greer the opportunity to resign, which Greer declined to do.

23. On or about July 28, 1997, I filed a statement of charges against firefighter Greer with the PFC for Greer's violation of Fire Department policies and rules and for violation of the City's anti-harassment administrative procedure memorandum 3-5.

24. The basis of the July 1997 charges included firefighter Greer's distribution of a "news release" entitled, "Homosexual Chief Rewards Homosexual Chief for Assault?" and the potential disruptive effect of such distribution and Greer's prior disciplinary record.

25. I received complaints from City of Madison residents, as well as firefighters, regarding Greer's verbal attacks on homosexuals.

26. In bringing charges to the PFC recommending termination of Greer's employment as a firefighter, I was seriously concerned with the disruptive effect of Greer's inappropriate comments on other employees, on management and on the public's confidence of the City of Madison to provide firefighting services to all citizens regardless of their sexual orientation.

27. In bringing charges seeking Greer's dismissal, I was concerned with Greer's inability to maintain a civil relationship with his supervisors.

28. Discipline and employee comradery are essential for the safe and efficient operation of the Fire Department and Greer's comments as reflected in the "news release" entitled "Homosexual Chief Rewards Homosexual Chief for Assault?" has the serious potential to adversely affect the efficient operation of the City of Madison Fire Department.

29. By Decision and Order dated July 31, 1998, the PFC sustained the charges and ordered that Greer be terminated from employment.

30. I have never publicly acknowledged my sexual orientation.

/s/ Debra H. Amesqua
Debra H. Amesqua

Subscribed and sworn to before me
this 16th day of April, 1999.

/s/ Irmgard J. Metz
Notary Public, State of Wisconsin
My commission expires: June 20, 1999.

FROM THE OFFICE OF THE MAYOR
ADMINISTRATIVE PROCEDURE
MEMORANDUM NO. 3-5

SUBJECT: HARASSMENT ON THE BASIS OF RACE, SEX, RELIGION, COLOR, AGE, DISABILITY, NATIONAL ORIGIN OR SEXUAL ORIENTATION

Policy: The City's Affirmative Action Plan commits all departments of City government to ensuring a harassment-free work environment for all persons, regardless of their race, sex, religion, color, age, disability, national origin or sexual orientation. Our diverse City employee base must be supported in a harassment-free work environment.

The constitutions of the United States and the State of Wisconsin protect the right of all citizens, including public employees, to speak freely on matters of public concern. We all recognize and value those rights. Citizens are not deprived of fundamental rights by virtue of working for the government.[1]

The constitutionality of the policy set forth in this Administrative Procedure Memorandum was upheld by the Wisconsin Court of Appeals in *James L. Gilbert v. Board of Police and Fire Commissioners of the City of Madison and Edward D. Durkin,* Case No. 84-769. Court of Appeals, Dist. IV, January 14, 1986. The Court's opinion stated:

> " . . . The free speech rights of public employees are not absolute. *Pickering v. Board of Education,* 391 U.S. 563, 568 (1968) We must balance the interests of the public employee, as a citizen, in commenting upon matters of public concern and

the interests of the government employer in promoting the efficiency of the public services it performs through its employees . . . " (slip op. p.8).

Rule: Any employee who shall engage in harassment[2] on the basis of race, sex,[3] religion, color, age, disability, national origin or sexual orientation; who permits employees under his/her supervision to engage in such harassment; or who retaliates or permits retaliation against an employee who reports such harassment is guilty of misconduct and shall be subject to remedial action, which may include the imposition of discipline up to and including discharge.

Employees are not permitted to retaliate against witnesses or persons who participate in the investigation of harassment. Such retaliation is also misconduct and may be subject to discipline, up to and including discharge.

Employee Complaints: All employees are urged to report instances of harassment to their department or division director. City employees may also make such complaints directly to the City Affirmative Action Director.

Obligations of Every Supervisor:

1. Supervisors Shall Respond to Employee Complaints

   A supervisor is obligated to notify the department head or division head at any time that an employee complains of harassment or of conduct which could constitute harassment.

2. Supervisors Shall Take Responsibility for Assuring a Harassment-Free Work Environment

Supervisors should demonstrate by their own conduct that they are committed to providing a work environment free of harassment. Supervisors shall, at all times, refrain from harassment and retaliation and should counsel and instruct subordinates in defining and preventing harassment.

3. Supervisors Shall Respond to Harassment by Persons Who Are Not City Employees

When employees report harassment by citizens, supervisors shall use all appropriate means to stop the harassing conduct. The supervisor shall promptly inform the department head or division head about the report and what was done to resolve it.

Obligations of Department and Division Heads: It is the duty of the City department and division directors, as well as others charged with the supervision of City employees, to take affirmative steps to ensure a harassment-free environment for all City employees. While such affirmative management will take many forms, the following steps are required of all department and division directors.

1. Accept and announce responsibility for maintaining a harassment-free work environment in his/her department, division or work unit.
2. Circulate this memorandum to all employees, at least once each year.
3. Cooperate with the Affirmative Action Department and the Human Resources Department in the development and implementation of necessary orientation, training, and education programs aimed at defining and preventing harassment.
4. Announce that all reported incidents of harassment will be fully investigated and that proven violations

will be met with appropriate sanctions, including, if indicated, disciplinary actions.

5. Require in writing that supervisors report to department/division directors all instances of reported harassment. The department/division director shall notify the City Affirmative Action Director immediately of the existence of reported instances of harassment.

6. Department/division heads are responsible for complaint investigation and resolution, including discipline, if indicated. They shall cooperate with the Affirmative Action Department in the conduct of investigations, but department/division heads bear final responsibility for disciplinary decisions.

7. The department or division head shall consult with the Affirmative Action Director to advise and assist in the investigation. The City Attorney, Labor Relations Manager, Human Resources Director and any other appropriate City official also may be called upon by the department head and the Affirmative Action Director to assist in the investigation.

Obligations of Affirmative Action Director: Whenever the Affirmative Action Director receives notification that an employee has complained of workplace harassment, or of conduct which could amount to harassment, the Affirmative Action Director shall inform the employee's department/division head.

The Affirmative Action Director shall develop and carry out training and education programs for all employees, including specialized training for supervisors, to help employees define and prevent workplace harassment.

The Affirmative Action Director shall assist the department/division head as necessary in investigating the complaint.

Confidentiality: All employees shall cooperate in investigating complaints of harassment. The nature of harassment violations, particularly those involving sexual harassment, requires a high degree of confidentiality and flexibility in approaches to investigation and resolution.

All employees shall keep their communications in such an investigation confidential and shall disclose them only to City officials and employees who need the disclosure in order to perform their duties.

Required Training: Any new or temporary Supervisor, Department, Division or Unit Head shall receive training regarding the application of this policy and regarding their responsibilities under this policy. The appointing authority shall notify the Affirmative Action Director and make arrangements for such training at the time of hire or assignment to supervisory responsibilities. Said training shall be provided by the Affirmative Action Director or her/his designee. This training shall be provided within 30 days of the effective date of the hire, promotion, transfer or temporary assignment to supervisory responsibilities. The appointing authority shall also ensure that, at the earliest date that training is available, arrangements are made for new or temporary supervisors to attend the City of Madison training module on How to Conduct the Employee Misconduct Investigative Interview.

Formal Complaints:

1. When harassment is reported, the Affirmative Action Director, or her/his designee, shall inform the Complainant of all appropriate agencies where formal complaints may be filed and inform the person of any time limit requirements to file a formal complaint with those agencies.

2. In the event that the employee files a grievance, or a formal complaint or lawsuit with an outside agency, the Affirmative Action Department, City Attorney's Office, Human Resources Department, Labor Relations Unit and the department involved will work cooperatively to conclude the investigation.

/s/ Paul R. Soglin
Paul R. Soglin
Mayor

APM No. 3-5
August 30, 1996

Supreme Court, U.S.
FILED
NOV 14 2000
CLERK

(3)

No. 00-461

IN THE

Supreme Court of the United States

RONNIE B. GREER,

Petitioner,

v.

DEBRA H. AMESQUA, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

REPLY OF PETITIONER TO RESPONDENTS' BRIEF IN OPPOSITION

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No. 00-461

In The

Supreme Court of the United States

RONNIE B. GREER,

Petitioner,

v.

DEBRA H. AMESQUA, ET AL.,

Respondents,

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITIONER'S REPLY TO RESPONDENTS' BRIEF IN OPPOSITION

In his petition, Ron Greer argued that the Seventh Circuit decision (1) conflicts with other circuits' application of the *Pickering* balance by approving a government employer's refusal to consider the truth or reasonableness of a whistle blower's charges and (2) presents significant constitutional questions (a) whether the *Pickering* balance requires such consideration, (b) whether high ranking gay and lesbian

administrators are entitled to special protection from criticism for violation of laws prohibiting favoritism based on sexual orientation and (c) whether employers may rely on evidence in district court which they neither investigated nor considered in the *Waters* proceedings.

Respondents argue that (1) the lower courts did not refuse to consider the truth of Greer's News Release, (2) the Seventh Circuit decision creates no conflict among the circuits and (3) an employer may rely in district court on evidence it neither investigated nor considered in its termination decision.

I. RESPONDENTS DRASTICALLY MISSTATE THAT THE LOWER COURTS "ASSUMED THE TRUTH" OF GREER'S NEWS RELEASE.

Without citation, Respondents mischaracterize the Seventh Circuit decision, claiming that the court assumed Greer's statements were true. Resp. Brief 24. However, the court explicitly approved the PFC's refusal to consider the truth of Greer's statements at all.

> In addition, Greer complains that the PFC excluded testimonial evidence which he claims would prove that his charges against Amesqua were true. . . . . With respect to a First Amendment retaliation claim, the relevant inquiry is whether the employer had reasonable grounds to believe that the employee had violated its rules and that its interests as an employer outweighed the employee's free speech interests. . . . . The PFC hearing was quite sufficient under this standard . . . .

Greer v. Amesqua, 212 F.3d 358, 368 (7th Cir. 2000). (Pet.-Ap. 15a.)

Respondents also argue that the PFC did not condition Greer's rights on the truth of his speech. Resp. Brief 21. But they do not dispute that the PFC refused to consider the truth or reasonableness of Greer's speech, and they ignore the

fundamental issue whether the PFC *should* have considered it.

Protecting the public's right to be informed about favoritism and corruption is a paramount public and governmental interest. (*See, e.g., Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1035 - 36 (1991) and *Nebraska Press Association v. Stuart*, 427 U.S. 539, 606 (1976) (J. Brennan, concurring). Clean government is a "quintessential" public concern. *Greer v. Amesqua*, 212 F.3d at 371 (citations omitted) (Pet.-Ap. 21a). Given the primacy of those interests, it is critical that this Court advise the circuits whether an employer may terminate a whistle blower for allegations of corruption without considering whether those allegations are true or reasonable.

II. THE COURT OF APPEALS DECISION CREATES CRITICAL DISAGREEMENT AMONG THE CIRCUITS

Respondents next argue that there is no conflict among the circuits and that, at most, there is only an internal conflict in the Seventh Circuit. Resp. Brief 24 - 26. However, after an exhaustive search of Seventh Circuit decisions (both before and after *Waters*), Petitioner is aware of no other case in which a government employer or court applying *Pickering* simply refused to consider substantial and credible evidence offered by a whistle blower that his accusations were true or well founded.

Since the decision in this case must be construed as consistent with prior holdings (*see, e.g., MCI Communications Corp. et al. v. American Telephone and Telegraph Co.*, 708 F.2d 1081, 1122 (7th Cir. 1982)), the Seventh Circuit must now be considered to leave within the employer's discretion whether to consider evidence substantiating a whistle blower's accusations. Such a holding directly conflicts with other circuits which have held repeatedly that it is improper and "absurd" to discharge a whistle blower whose well-founded allegations cause disruption in the office of a corrupt employer. *See* Petition, 17 - 21.

Respondents also reiterate the Seventh Circuit's mischaracterization of Greer's argument that he asked for "absolute protection" of true statements. Resp. Brief, 23 - 24. But Greer has *never* sought absolute protection of true speech, only that the truth or reasonableness of his statements be considered as part of the *Pickering* balance.

Finally, Respondents argue that Greer saw only a videotape of the Holtz-Cato incident and that an employer under *Waters* need only consider an employee's knowledge based on direct, first hand observation. Resp. Brief, 10-14. Such a prophylactic rule yields horrific results. Had the Los Angeles Police Department disregarded the Rodney King videotape and whitewashed the beating, a veteran officer disciplined for publicly questioning the whitewash could not have argued that his statements were true or reasonable based on his experience and his viewing the tape. Again, it is critical that this Court consider whether and under what circumstances discretion to consider the truth or reasonableness of a whistle blower's statements may be left within the discretion of a corrupt employer who is the very target of the charges.

III. THE COURT SHOULD CLARIFY WHETHER DISTRICT COURTS MAY RECEIVE EVIDENCE NOT INVESTIGATED OR CONSIDERED BY AN EMPLOYER IN DISCHARGE PROCEEDINGS

Respondents' summary judgment motion was based entirely on evidence developed during the district court litigation almost one year after the PFC issued its decision. *See* Petition, 12 - 14. Respondents claim that the lower courts did not utilize their post-hearing evidence except for "background facts."[1]

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[1] Respondents deny that their post-hearing evidence was critical, yet their Statement of Facts relies exclusively on that evidence. Of their 147 references to the district court record, 105 are to Greer's post-PFC hearing deposition and twenty-one are to Debra Amesqua's

Resp. Brief, 28. However, the district court based its decision on a lengthy, one-sided recitation of Greer's disciplinary history taken directly from Amesqua's post-hearing affidavit. *See* Petition, 12 - 13. The Seventh Circuit relied almost exclusively on Respondents' post-hearing submissions without even acknowledging that Greer had challenged them. *See* Petition, 13 - 14, Pet.-Ap. 2a - 5a.

Alternatively, Respondents argue they were entitled to rely on new evidence because Greer raised his First Amendment rights for the first time in district court. Resp. Brief, 27. That is a blatant misstatement of the record. The PFC acknowledged Greer's First Amendment claims and ruled on them explicitly. Pet.-Ap. 100a - 104a.

Respondents next argue that an employer which failed to consider a *Pickering* factor such as potential disruption during a termination hearing would be barred from presenting such evidence in a subsequent civil rights suit. Resp. Brief, 29. But the purpose of a civil rights suit is to find out what an employer *did* rely on in terminating an employee, not what it *might* have relied on. If, in fact, the employer has a full and fair opportunity to litigate an issue in an administrative proceeding and does not do so, the employer is foreclosed from relitigating the issue by the doctrine of "administrative *res judicata*." *See, e.g., Kremer v. Chemical Construction Corporation*, 456 U.S. 461, 485 n. 26 (1982). *Waters* requires a reasonable investigation, and this Court should provide guidance whether an employer is barred from presenting *post hoc* evidence it neither investigates nor considers in discharging an employee.

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post-hearing affidavit. Of seventeen references to the actual hearing record, ten cite the work rules at issue, seven cite the News Release, and four cite the PFC decision. Resp. Br. 7 - 8, 11. Respondents present *no* citations to the evidentiary record.

IV. PETITIONER DID NOT WAIVE ANY ISSUES PRESENTED IN HIS PETITION

Last, Respondents make several waiver arguments, *none* of which they have previously presented in any court. They state that Greer could make whatever statement he wanted to at the hearing, apparently implying that he had the opportunity to present the truth of his position before the PFC. Resp. Brief 16. Again, this is factually misleading. The hearing they reference was an investigative hearing, not the discharge hearing. Further, despite Greer's failure to recall the details of that investigative at his deposition over two years later, Respondents well know that Greer was ordered to appear and answer a prepared list of sixty-three questions prepared by the City Attorney. Greer was not permitted to present any defenses or even deviate from or ask for clarification of the questions. Pet.-Rep.Ap. 1a - 3a.

Without citation, Respondents also argue that having foregone state appellate review of the Commission's decision, Greer cannot obtain review in a federal court civil rights lawsuit. Resp. Brief 22. This claim borders on the frivolous. It is well settled that exhaustion of state remedies is not required to commence an action under 42 U.S.C. § 1983. *Patsy v. Board of Regents*, 457 U.S. 496, 516 (1982).

Finally, again without citation, Respondents argue that the "appropriate challenge to evidentiary determinations by the fact finder in a state administrative proceeding is through the appeal channels allowed by state statute, not through federal court review." Resp. Brief, 7. Besides ignoring *Patsy*, Respondents also ignore well settled law that where a state administrative agency incorrectly exclude as irrelevant an employee's evidence offered to sustain a constitutional defense, the employee has been deprived of a full and fair opportunity to litigate the issue, and his § 1983 action is permitted to proceed. *Balcerzak et al. v. City of Milwaukee, et al.*, 163 F.3d 993, 997 (7th Cir., 1998) (citing *Jones v. City of Alton*, 757 F.2d 878 (7th Cir. 1985).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

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APPENDIX

APPENDIX

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1. Hearing Transcript, p. 94 – 95, App. 547

BEFORE THE BOARD OF POLICE & FIRE
COMMISSIONERS
CITY OF MADISON

In Re: The Charges Of

CHIEF DEBRA AMESQUA,
Complainant,

-vs-

RONNIE B. GREER,
Respondent.

TRANSCRIPT OF PROCEEDINGS

(Whereupon, the following proceedings reconvened on Monday, January 12, 1998, commencing at 7:00 p.m.)

. . . .
. . . .

Q So it's the list of 63 questions, correct?
A Correct.
Q Did you personally write any of these questions?
A I did.
Q All of them?
A No, not all of them.
Q Do you recall specifically which ones you did?
A As I recall Attorney Petri drafted all the questions up to the rule violation questions.

[Excerpt, pages 340.]

. . . .
. . . .
Q Does he have a right to call witnesses?

A No. We typically allow the employee to come in with union and/or legal representation, but the employee is there to speak on his or her own behalf.
Q So he's not entitled to call witnesses?
A I have not been permitting them to bring in witnesses.
Q And that would of course include not being permitted to question the department's evidence either, correct?
A That's correct. He can't question the department. He can ask clarification questions if he doesn't understand my questions, but he can't cross-examine me.
Q And in this case Firefighter Greer was not permitted to call witnesses, was he?
A At the predetermination hearing, no, he was not.
Q And he was not permitted to question any evidence presented by the department, correct?
A He was not permitted to question any evidence, that's correct.
Q You did not give him copies of any of the questions in advance, did you?
A No, I did not.

[Excerpt, pages 343 - 44.]

. . . .
. . . .

Q Chief Saxe, do you believe that the Seven Standards under Section 62.13 (5) (e) (m) require you as the investigating officer to anticipate or investigate any possible defenses to the charges?

. . . .
. . . .

A As I look at the Seven Standards I know that it requires that I conduct a fair and impartial investigation, but I don't know anything in the standards that requires me to look for defenses when I conduct that fair and impartial investigation.
Q So your answer is no?

A No.
Q Thank you. It's also -- strike that.
You believe that you as the investigating officer have the authority to order Firefighter Greer's attendance at the predetermination hearing, don't you?
A As a chief officer I have authority to order Firefighter Greer to do many things, yes.
Q And you also have the authority to order him to answer these questions whether he wishes to or not, is that correct?
A That's correct.

[Excerpt, pages 367.]